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### THESIS

**AN ANALYSIS OF BEST VALUE  
PROTESTS OF 1997**

by

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June 1998

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Best value sustainments (21 total) are first categorized in this thesis by agency improprieties in the evaluation of a tradeoff element (e.g. past performance, technical merit, cost/price, or labor qualifications) or improper pre- or post-award changes. The sustainments are then thoroughly analyzed to reveal pitfalls which contracting officers must avoid to preclude protest sustainment.

These pitfalls are then incorporated into a final analysis where they are merged with the contracting process (acquisition planning, solicitation, source evaluation/selection, negotiation, award, contract administration) and examined for greater clarity. Examples of the common pitfalls which resulted in sustainment in 1997 are uncertainty of requirements, poorly crafted solicitations, failure to follow solicitations, failure to use all relevant facts, failure to evaluate total cost/price, improper cost/price realism analyses, pre-award solicitation changes without modification, failure to hold meaningful discussions when required, failure to support contract award with narrative, out-of-scope post award changes, and contract administrative improprieties.

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Submitted in partial fulfillment of the  
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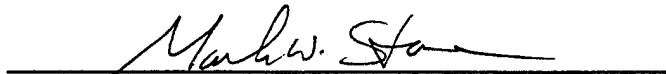
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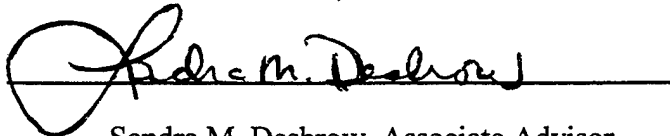


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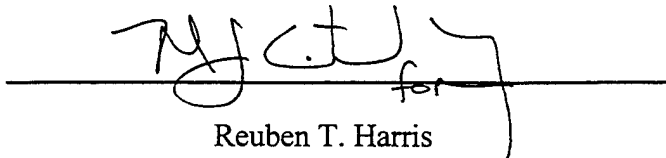
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## **ABSTRACT**

Best value is the driving theme in the newly approved rewrite of the FAR Part 15. Best value is now the goal of all negotiated Government procurements. One measure of contracting officer effectiveness is to examine protest decisions handed down by the General Accounting Office (GAO). This thesis examines all protest decisions of best value awards from 1997. The research reveals a sustainment (success) rate of 19.44 percent for 1997. GAO's published sustainment rate for all protests is 12 percent for the same year.

Best value sustainments (21 total) are first categorized in this thesis by agency improprieties in the evaluation of a tradeoff element (e.g. past performance, technical merit, cost/price, or labor qualifications) or improper pre- or post-award changes. The sustainments are then thoroughly analyzed to reveal pitfalls which contracting officers must avoid to preclude protest sustainment.

These pitfalls are then incorporated into a final analysis where they are merged with the contracting process (acquisition planning, solicitation, source evaluation/selection, negotiation, award, contract administration) and examined for greater clarity. Examples of the common pitfalls which resulted in sustainment in 1997 are uncertainty of requirements, poorly crafted solicitations, failure to follow solicitations, failure to use all relevant facts, failure to evaluate total cost/price, improper cost/price realism analyses, pre-award solicitation changes without modification, failure to hold meaningful discussions when required, failure to support contract award with narrative, out-of-scope post award changes, and contract administrative improprieties.



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## **I. INTRODUCTION**

### **A. BACKGROUND**

Best Value is the driving theme in the newly approved rewrite of Federal Acquisition Regulation (FAR) Part 15. The stated purpose of this was to infuse innovative techniques into the source selection process, simplify the process, and facilitate contract award under best value criteria. [Ref. 1: p. 51224] The task at hand is for Federal agency contracting officers to implement best value source selection into Government procurement in a manner consistent with Congress' intentions. One method used by Congress to exert its right to influence and investigate Government acquisition is through the system of award protest. Congress' investigative arm, the General Accounting Office (GAO) provides an arena for contract award protests and renders non-binding but influential decisions regarding source selection. This mechanism is the result of a statutory mandate under the Competition in Contracting Act (CICA) of 1984 tasking GAO to assess the reasonableness of source selection decisions and determine whether a procurement has been conducted in accordance with all applicable statutes and regulations [Ref. 2]. The overarching goal of CICA is full and open competition, and this Act has dominated Government contracting for over a decade. GAO protest decisions are a key indicator of Congress' intent in the domain of Government procurement. Federal agencies of the Executive Branch should look to such decisions for messages from the Legislative Branch.

During a protest, GAO requires an agency to provide certain information consistent with FAR documentation requirements so that it may be established whether the evaluation of proposals and the source selection decision were reasonable. The FAR has always required agencies to document the relative strengths, deficiencies, significant weakness, and risks supporting the proposal evaluation and source selection. However, the FAR Part 15 rewrite recognizes the subjective nature inherent in best value contracting. Contracting officers must now balance tradeoffs in an effort to obtain the best value for the Government. Tradeoffs are appropriate when it may be in the best interest of the Government to consider award to an offeror *other* than the lowest priced offeror or the highest technically rated offeror. As a result, the FAR Part 15 rewrite requires that in addition to common quantitative measures and matrices used in proposal evaluation, the agency shall document rationale for any business judgments and tradeoffs including supporting narrative [Ref. 1: 15.305, 15.308]. GAO has recently upheld protests because adjectival ratings needed to be accompanied by a reasoned explanation for cost/non-cost tradeoffs. In addition, agency contracting officers now face increased GAO scrutiny of their *judgment* of what constitutes best value in addition to the typical review of adjectival ratings, matrices, technical appraisals, and cost evaluation.

## **B. OBJECTIVE**

The goal of this research is to ascertain whether or not best value contracting is more susceptible to sustainable protests. The thesis focuses on contracting officer

judgment in source selection and evaluates the difficulties regarding contract award through best value determination. This document outlines the genesis and background of best value, describes laws and regulations that apply, and researches the 146 Comptroller General protest decisions from 1997. Lessons from the sustained protests of 1997 have been developed to assist contracting officers to effectively implement best value in source selection.

### **C. THE RESEARCH QUESTION**

The primary research question is: "To what extent does the exercise of Federal agency contracting officer judgment, in best value source selection, result in a higher rate of GAO protest sustainment than other methods of source selection?" The subsidiary research questions are:

- What is best value, the genesis of the concept, the evolution of this type of contracting, current implementation, and the regulations that apply?
- Can the types of award protests and subsequent sustainments be categorized?  
If so, what are the categories?
- Are there measures that a contracting officer can take to preclude protests regarding best value awards?
- How may contracting officers be better trained regarding best value awards?

#### **D. SCOPE, METHODOLOGY, LIMITATIONS, AND ASSUMPTIONS**

This study focuses on the current nature and pitfalls inherent to best value contracting. The primary concentration of study consists of the 146 decisions rendered by the Comptroller General in response to protests of contract award under best value criteria. Other areas of study include a literature search of Government regulations, magazine articles, commentary, and other library information resources. The methodology consists of the following:

1. A brief examination of all best value protests to identify sustainments and basic statistics.
2. A thorough examination of the sustained protests.
3. Categorization of the sustained protests.
4. Analysis of the sustained protests.
5. Generation of recommendations and conclusions regarding the sustained protests.

This research is limited to best value protests that allege Federal agency improprieties in the determination of a best value award and/or Federal agency actions that undermine an otherwise proper best value contract award. The primary assumption in this study is that the reader is familiar with the basic rudiments, types, and processes of Government contracting.



## **E. ORGANIZATION OF THE THESIS**

The following chapters in this thesis document the significance of best value and examine the protests involving best value contracting in 1997. Chapter II is a review of best value contracting including the genesis, evolution, and current state of this type of acquisition. Chapter III is an overall study of all best value protests in 1997. The study includes a review of the protest system, overall number of protests, and the overall success of protests in general throughout 1997. This chapter also categorizes the recurring reasons for protest. Chapters IV, V, VI, and VII review and analyze the best value protests that were sustained due to Federal agency improprieties in the evaluation of past performance, technical merit, cost/price, and labor qualifications respectively. Chapter VIII reviews and analyzes protests that were sustained due to improper Federal agency pre- and post-award changes. Chapter IX provides a final analysis and conclusion.



## **II. REVIEW OF BEST VALUE CONTRACTING**

### **A. INTRODUCTION**

This chapter provides background into the concept of best value. The purpose of this chapter is to provide the reader with a firm grasp of the concept from its inception to its present state. Thorough understanding of the best value concept provides the reader with a firm foundation of knowledge to make better use of the material discussed in the remaining chapters of the thesis. This chapter addresses best value in the following manner. First, important definitions of best value terms are outlined. Second, the genesis of the best value concept is discussed. Third, the evolution of best value is detailed. Finally, a review of the current state of best value is conducted.

### **B. DEFINITIONS**

The following definitions are derived from the Federal Acquisition Regulation (FAR) and are important to understand fully the nature and current state of best value contracting in the Federal Government.

#### **1. Best Value**

The expected outcome of an acquisition that, in the Government's estimation, provides the greatest overall benefit in response to the requirement. [Ref. 1: 2.101]

#### **2. Best Value Continuum**

An agency can obtain best value in negotiated acquisitions by using any one or a combination of source selection approaches. In different types of acquisitions, the

## **2. Best Value Continuum**

An agency can obtain best value in negotiated acquisitions by using any one or a combination of source selection approaches. In different types of acquisitions, the relative importance of cost or price may vary. The choosing of the source selection approach will normally relate to the relative importance between cost and non-cost factors. [Ref. 1: 15.101]

## **3. Tradeoff Process**

In negotiated procurement, the approach most commonly used to achieve a best value selection is a tradeoff process where dollars are traded for incremental value and cost is only one factor, not the controlling factor. A tradeoff process is appropriate when it may be in the best interest of the Government to consider award to other than the lowest priced offeror or other than the highest technically rated offeror. [Ref. 1: 15.101-1]

## **4. Lowest Price-Technically Acceptable**

The lowest price-technically acceptable process is appropriate when best value is expected to result from selection of the technically acceptable proposal with the lowest evaluated price. [Ref. 1: 15.101-2]

## **C. GENESIS OF BEST VALUE**

There is no definitive starting point to the concept of best value. It is clear that businesses have historically sought to purchase goods and services advantageous to their pursuit of profit. The Government is not motivated by profit; however, increased

emphasis has been placed on the efficiency of the acquisition process over the past 15 years. The genesis of best value contracting in Government acquisition can be explored through study of the Government's efforts to reform the acquisition process and adopt commercial practices. [Ref. 7]

## **1. Concept Origin**

During the mid-1980's a series of acquisition reform measures began that affect every aspect of Government contracting to this day. Most of these measures addressed best value either directly or indirectly. The first move toward the current state of best value occurred through the Government's focus on the use of *commercial practices*. The 1986 Packard Commission Final Report concluded that the use of commercial practices in the DoD acquisition process had the potential for saving vast amounts of Federal funds. In conjunction, the 1986 Defense Science Board stated that program managers should have discretionary authority to use commercial practices and products when appropriate. Commercial practices are "techniques, methods, customs, processes, rules, guides, and standards, normally used by businesses, but either applied differently or not used by the Federal Government." [Ref. 4: p. 1-2] One such practice is best value. In the commercial sector, buyers use competition to their advantage, getting the maximum value at an affordable price. The objective is not necessarily lowest price or maximum performance, but a balance between the two. In 1989, DoD officially recognized the best value concept in a study entitled *Best Value Evaluation Process*. The Government had no

set definition for best value at the time because the *best value* constantly changed according to the requirement of each individual purchase. Best value was generally accepted to mean buying on other than a price only basis. [Ref. 4: p. 1-1, 3-2]

## **2. Competition In Contracting Act (CICA) Clarification**

A 1991 clarification by Congress regarding the 1984 Competition in Contracting Act (CICA) prompted the Government to focus on best value. CICA's drive for free and open competition was sparked by the assumption that competition would result in lower acquisition costs for the Government as well as expanding contracting opportunities to every level of business. Initially there was confusion between GAO and DoD regarding the legislation because many in DoD improperly interpreted the Act as defining lowest cost to mean lowest price rather than lowest long-term costs. In 1991, the House Armed Services Committee Report for the Defense Authorization Act issued a clarification stating that Congress had attempted to make clear that lowest overall cost was not limited to price and price-related factors. Lowest overall cost was intended to be the outlay or expenditure that the Government would make over the life of a product. The committee went on to state that cost also encompasses technical factors such as quality, design, technical capability, management capability, past performance, and cost discipline to the extent these factors can be translated into a monetary context, and offerors can be given a clear indication in the solicitation how the factors would be quantified. This new interpretation of CICA led to the introduction of best value. [Ref. 5: p. 59-60]

## **D. EVOLUTION OF BEST VALUE CONTRACTING**

### **1. Federal Acquisition Streamlining Act**

The Federal Acquisition Streamlining Act (FASA) of 1994 enacted sweeping acquisition reform over a wide spectrum of issues. The relationship between FASA and best value was indirect; however, it is important to note that this Act drove many elements of the FAR Part 15 rewrite and its specific emphasis on best value contracting. A key concept in FASA was a movement of Government contracting to commercial methods. This requirement of commercial contracting methods was the vital element leading to the Government's future use of best value acquisition.

FASA required that agencies clearly establish the relative importance assigned to evaluation factors and sub-factors. FASA specifically addressed the quality of the product or services to be provided including technical capability, management capability, prior experience, and past performance of the offeror. Cost was carefully addressed as *only one of many evaluation factors* as FASA required all combined evaluation factors other than cost or price be disclosed as significantly more important, approximately equal, or significantly less important than cost or price. This portion of the Act provided the groundwork for the tradeoff process which is essential to best value contracting. Through its recognition of other evaluation factors besides cost, FASA allowed Government agencies to venture into the spectrum of options now available through the use of tradeoffs. [Ref. 6: Sec. 1011]

## **2. Clinton-Gore Administration**

Best value contracting received high-level endorsement in the first term of the Clinton-Gore Administration. Vice President Gore in the *Report of the National Performance Review: Creating a Government that Works Better & Costs Less* recognized the need for deregulation in the acquisition process. The report maintained that acquisition regulations should: shift from rigid rules to guiding principles; promote decision making at the lowest possible level; end unnecessary regulatory requirements; foster competitiveness and commercial practices; and shift to a new emphasis on choosing “best value” products. In early 1996, the FAR Council pursued this shift to best value contracting by tasking an ad hoc interagency committee to rewrite FAR Part 15.

[Ref. 1: p. 51224]

## **3. Federal Acquisition Regulation (FAR) Part 15 Rewrite**

FAR Part 15 is one of the most important and significant parts of the Federal Acquisition Regulation because it addresses contracting by negotiation and competitive range determination. Within the Government, the majority of contracting expenditures are accomplished using Part 15 procedures. The Part 15 rewrite is a normal product of the continuous improvement process employed for maintenance of the FAR, and it conforms with the general reform philosophy espoused by the Clinton-Gore Administration. FAR Part 15 was rewritten for reasons other than the direction of the Executive Branch. Congress, through FASA in 1994 and the Clinger-Cohen Act in 1996 dictated so many



fundamental changes in Government acquisition that the rewrite became an obvious necessity. In 1995, the Department of Defense (DoD) conducted a survey of the defense industry, Military Departments, and defense agencies to ascertain which parts of the FAR were most in need of revision. The responses indicated a general consensus that Part 15 was one of the parts that would benefit most from such an effort. In addition, a FAR Improvement Study conducted by the General Services Administration (GSA) indicated that subparts 15.6 (Source Selection) and 15.8 (Price Negotiation) were the most difficult parts of the FAR to use. The FAR Part 15 rewrite took effect on 10 October 1997. [Ref. 1: p. 51225]

#### **E. CURRENT STATE OF BEST VALUE**

The current state of best value contracting from the perspective of the Government is contained within the FAR Part 15 rewrite. In sum, best value is the expected outcome of any acquisition that ensures the customer's needs are met in the most effective, economical, and timely manner. It is the result of the combination of: the unique circumstances of each acquisition; the acquisition strategy; choice of contracting method; and the award decision. Best value is the goal of sealed bidding, simplified acquisition, commercial item acquisition, negotiated acquisition, and any other specialized acquisition method or combination of methods. Through the best value continuum the Government always seeks to obtain the best value in negotiated acquisitions using any one or a combination of source selection approaches, and that

acquisition should be tailored to the requirement. At one end of this continuum is the lowest priced-technically acceptable strategy and at the other end is a process by which elements of a proposed solution can be traded off against each other to determine the solution that provides the Government with the overall best value. All such tradeoffs must be conducted according to the source selection factors and sub-factors identified in the solicitation. [Ref. 3: p. 1]

## **F. CONCLUSION**

The importance of best value cannot be overstated. The concept has been transformed from an undefined, nebulous entity to the mandated goal of all Government procurements. Best value is nothing new to the corporate sector; however, the Government is a relatively new participant in the world of best value. Government contracting officers must now employ this form of contracting without the benefit of significant experience to guide the way. The intent of this thesis is to counter the Government contracting officers' lack of best value experience with a thorough review and analysis of recent protests of best value contract awards. Chapter III will review all protests of contract awards under best value criteria.

### **III. OVERALL REVIEW OF FISCAL YEAR 1997 BEST VALUE PROTESTS**

#### **A. INTRODUCTION**

This chapter provides an overall view of all best value protests for which the Comptroller General issued decisions in 1997. This chapter is beneficial because it gives the reader a firm understanding why contractors seeking Government business protested best value contract awards in 1997. First, a review of the protest process is conducted. Second, the methodology used to define a best value protest is outlined. Third, the protest sustainments are categorized. Finally, statistics are provided for each sustainment category.

#### **B. PROTEST PROCESS**

##### **1. Purpose**

In deciding bid protests, GAO considers whether Federal agencies have complied with statutes and regulations controlling Government procurements. As stated in Chapter I, Congress exerts its right to influence and investigate Government acquisition through the system of award protest. Congress' investigative arm, GAO provides a venue for contract award protest and renders non-binding but influential decisions regarding source selection. [Ref. 2]

## **2. The Process**

The bid protest process begins with an unsuccessful offeror filing a written protest at GAO. Unless the protest is dismissed due to procedural or substantive defects (e.g., the protest is untimely or the protest fails to clearly state legally sufficient grounds of protest), the contracting agency must submit an agency report to GAO responding to the protest and a copy of that report must be provided to the protester. The protester then may file written comments on the report.

During the course of a GAO protest, the Comptroller General may schedule informal meetings or conferences to resolve procedural matters and obtain information pertaining to the disposition of the protest. GAO may also find that a hearing must be held to resolve factual and legal issues raised in the protest. If it decides to hold a hearing, GAO will often conduct a pre-hearing conference to (1) decide the issues that will be considered at the hearing, (2) identify the witnesses who will testify at the hearing, and (3) settle procedural questions. After the hearing, all parties may submit written comments.

After the record is complete, GAO will consider the facts and legal issues raised and issue a decision. A copy will be sent to all parties participating in the protest. GAO may sustain the protest (that is, find that the agency violated a procurement statute or regulation and prejudiced the protester), in which case GAO will recommend appropriate corrective action. Conversely, GAO may deny the protest or dismiss the protest without

reviewing the matter. GAO issues its decisions within 100 days from the date of protest filing. [Ref. 8]

### **C. METHODOLOGY FOR NARROWING THE BEST VALUE PROTESTS**

Several assumptions regarding the research must be understood. There were a total of 146 decisions rendered by GAO on best value contract awards, and 23 of the protests were sustained. Protests are initiated by contractors for many reasons such as perceived improprieties in the solicitation, competitive range determination, or evaluation of the various proposals. It is important to note that although each of the 146 decisions were about a best value contract, some of the protests and sustainments had nothing to do with the best value criteria in the solicitation. This study focuses first on protests that challenge the very process of determining the best value offeror. The process is called the *tradeoff process*. As previously discussed, FAR Part 15 defines the tradeoff process as part of the best value continuum where dollars are traded for incremental value and cost is only one factor-not the controlling factor. The tradeoff process is appropriate when it may be in the best interest of the Government to consider award to other than the lowest priced offeror or other than the highest technically rated offeror. In addition to the tradeoff elements, this study focuses on protests that challenged Federal agency pre- and post-award changes. These protests alleged that agency actions (changes) invalidated the best value source selection. For the purpose of this study, a protest of a best value award occurs when (1) a Federal agency evaluation of a tradeoff element is challenged (e.g.

cost/price, technical merit, past performance, labor rates), or (2) an improper agency pre- or post-award change occurs that compromises an otherwise proper best value award.

#### **D. OVERALL STATISTICS**

The 146 protests and 23 sustainments of best value awards were narrowed to the 108 protests and 21 sustainments that met the researcher's definition of a best value award protest (improper agency evaluation of a tradeoff element or improper pre- or post-award changes). The other protests were simply challenges of agency evaluations of peripheral elements that were in a best value solicitation only by chance (e.g. competitive range determinations, constitutionality). Of these 108 protests, 87 were denied or dismissed, and 21 were sustained yielding a sustainment (success) rate of 19.44 percent. This compares to an overall sustainment rate of 12 percent for all protests in 1997. [Ref. 9] The sustained protests will be categorized and discussed for the remainder of the chapter. The Appendix lists all 146 protests reviewed during the research.

#### **E. SUSTAINMENT CATEGORIES**

The 21 sustainments address specific allegations regarding Federal agency evaluation of best value proposals. Nearly all of the protests cited more than one reason for protest. The categorical breakdown outlined below represents the category and success rate of the reasons for sustainment of the 21 best value protests.

### **1. Improper Agency Evaluation of Past Performance**

Past performance information is one indicator of an offeror's ability to perform a contract successfully. Relevant past performance can be used effectively by contracting officers to predict the capability of offerors. Improper Federal agency evaluation of past performance was a sustaining argument in six (5.56 percent) of the 108 protests. These six sustainments represent 28 percent of the 21 successful best value protests.

### **2. Improper Agency Evaluation of Technical Merit**

Evaluation of technical merit is key to best value tradeoff and source selection. Technical merit is a prime indicator of quality. Current regulations mandate a technical assessment whenever tradeoffs are performed. [Ref. 1: 15.305] Improper Federal agency evaluation of technical merit was a sustaining argument in seven (6.48 percent) of the 108 protests. These seven sustainments represent 33 percent of the 21 successful best value protests.

### **3. Improper Agency Evaluation of Cost/Price**

Cost/Price is clearly one of the most important elements in negotiated procurements. It is also a central tradeoff element in best value source selection. Improper Federal agency evaluation of cost/price was a sustaining argument in six (5.56 percent) of the 108 protests. These six sustainments represent 28 percent of the 21 sustainments.

#### **4. Improper Agency Evaluation of Labor Qualifications**

Labor qualifications are often an important tradeoff element in best value source selection. Special or unique qualifications bring value to an offeror's proposal as well as cost. Improper Federal agency evaluation of labor qualifications was a sustaining argument in two (1.56 percent) of the 108 protests. These two sustainments represent 9.52 percent of the 21 successful protests.

#### **5. Improper Agency Pre- or Post-Award Changes**

Improper agency pre- or post-award changes are contracting officer actions which undermine and invalidate otherwise proper best value awards. Improper Federal agency pre or post-award change was a sustaining argument in three (2.78 percent) of the 108 protests. These six sustainments represent 14 percent of the 21 sustainments.

Figures 3-1 and 3-2 outline the overall and sustainment statistics.



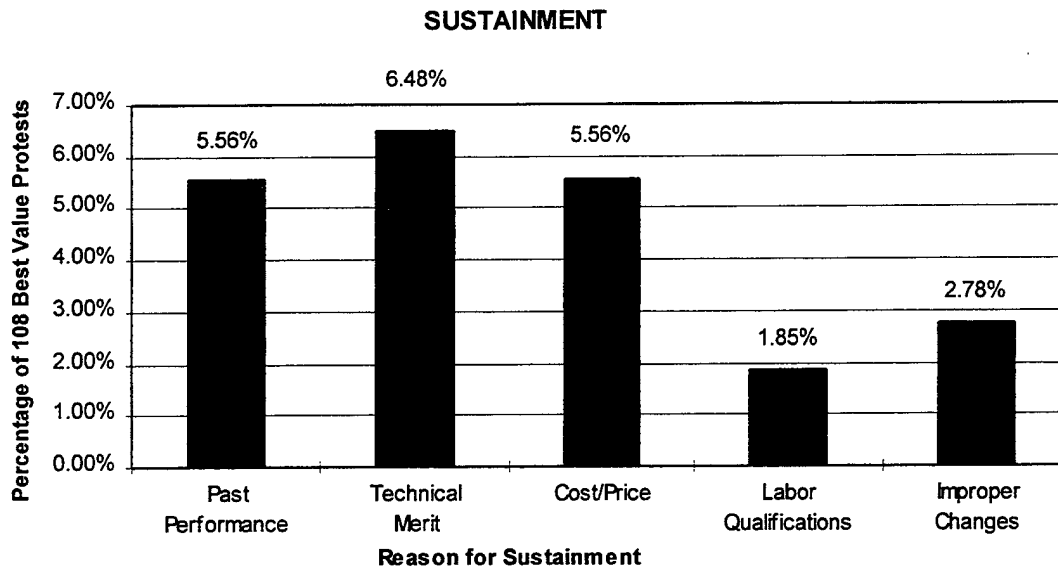


Figure 3-1

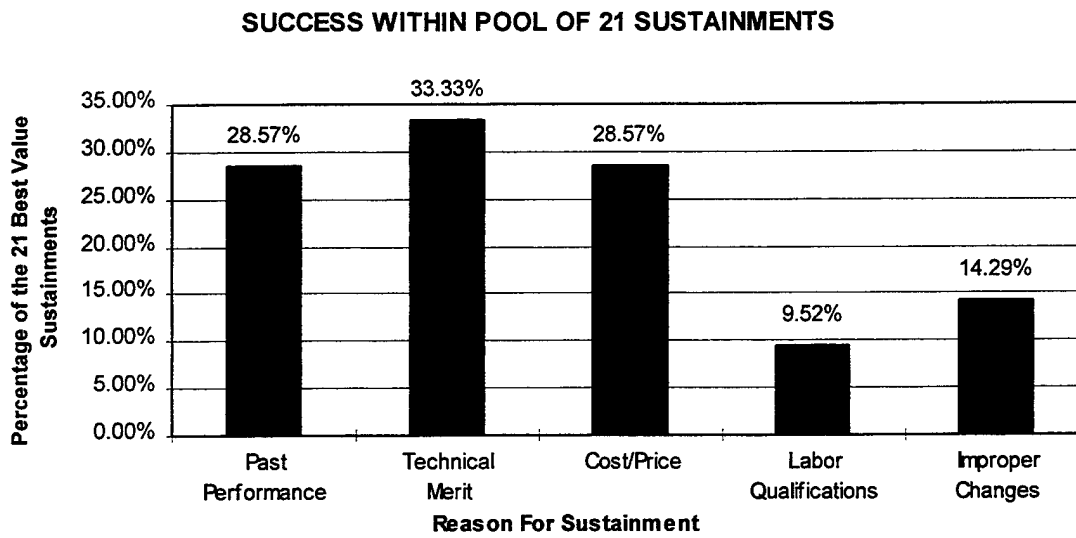


Figure 3-2

## **F. CONCLUSION**

This chapter displays the dominant reasons for success in the 21 best value sustainments in 1997. Improper evaluation of tradeoff elements (past performance, technical merit, cost/price, and labor qualifications) made up 18 (85.71 percent) of the 21 sustained protests. Improper pre- or post-award changes were sustaining arguments in only 3 of the 21 sustainments; however, it is important to note that this offense was alleged only three times in the pool of 108 best value protests. In other words, even though improper changes were alleged infrequently, they were successful every time. Chapter IV discusses and analyzes the six protests that were sustained for agency improprieties in past performance evaluation.

## IV. PAST PERFORMANCE

### A. INTRODUCTION

Past performance information is one indicator of an offeror's ability to perform a contract successfully. [Ref. 1: 15.305] Improper evaluation of past performance was a sustaining argument in six (28 percent) of the 21 successful best value protests in 1997. This chapter details all six protests and illustrates common elements leading to sustainment. The protests in which improper evaluation of past performance was a sustaining element are *American Combustion Industries, Inc.*; *International Business Systems, Inc.*; *McHugh/Calumet, A Joint Venture*; *Mechanical Contractors, S.A.*; *NavCom Defense Electronics, Inc.*; and *ST Aerospace Engines Pte. Ltd.* The six protests are divided into two categories:

1. Improper evaluation of awardee or protester past performance;
2. Failure to conduct meaningful discussions regarding adverse past performance reports.

One of the protests included both of the above categories as successful sustaining arguments. This chapter discusses current and past regulations regarding past performance, describes the six sustained protests, and provides analyses of Federal agency miscues when evaluating past performance.

## **B. PAST PERFORMANCE AND FAR PART 15**

Past performance is, by statute, a mandatory evaluation element of all negotiated source selections. It is also a key tradeoff element in best value contracting. Before analyzing best value sustainments for improper evaluation of past performance, it is important to understand the effect of the FAR Part 15 changes that were published on 30 September 1997. Past performance evaluation, both before and after the rewrite, has several basic precepts. First, all factors and significant sub-factors regarding past performance must be stated in the solicitation. In addition, the offerors shall be provided with an opportunity to identify past or current similar contracts as well as an opportunity to comment on adverse reports. [Ref. 1: 15.304] While the rewrite was not in effect when GAO issued most of the 1997 decisions, the planned changes were well known. With respect to past performance, the FAR Part 15 changes were few. One significant difference is that before the rewrite, firms lacking relevant past performance history received a *Neutral* evaluation for past performance. [Ref. 13: 15.608] The rewrite modified this part of the regulation to state that an offeror without a record of relevant past performance or for whom information on past performance is not available, may not be evaluated favorably or unfavorably on past performance. In addition, the rewrite states that the Government will not rely on adverse past performance information about which the contractor's have not had an opportunity to comment. [Ref. 1: 15.305] Even if the award is to be made without discussions, offerors must be given the opportunity to

clarify certain aspects of their proposals (e.g. relevance of an offeror's past performance information and adverse past performance information) to which the offeror has not previously had an opportunity to respond. [Ref. 1: 15.306] The newest exchange (communications) allows exchanges prior to the establishment of the competitive range to assist in the competitive range determination, address adverse past performance reports, and clear ambiguities. The implication for the contracting officer is that there is now an avenue outside the clarification/discussion realm that allows tailored exchanges with offeror(s) about adverse past performance references.

The remainder of this chapter analyzes the six protests that were sustained due to improper agency evaluation of past performance in 1997.

### **C. IMPROPER EVALUATION OF AWARDEE/PROTESTER PAST PERFORMANCE**

#### **1. International Business Systems, Inc.**

*International Business Systems, Inc., B-275554, Comptroller General of the United States, 3 March 1997, (IBSI)* was sustained due to agency improprieties in evaluating past performance. IBSI protested the Veteran's Affairs (VA) award of a fixed-priced contract for a replacement telephone system for the VA Medical Center, Wilkes-Barre, Pennsylvania. The contract competition was limited to participants in the Small Business Administration's (SBA) Section 8(a) small, disadvantaged business program.

The VA found Dulles Networking Associates, Inc. (DNA) to be the offeror whose proposal was determined to be most advantageous to the Government.

The evaluation scheme involved a two-step review. First, technical proposals were to be evaluated on a pass/fail basis. Second, the technically acceptable offers would be reviewed for price and past performance which were weighted equally in the Request for Proposals (RFP). Adjectival ratings were to be assigned to each offeror for past performance. Three proposals including IBSI and DNA were found technically acceptable. DNA offered the lowest price (\$ 2.4 million) and was issued a past performance rating of *Excellent*. IBSI offered a price of (\$ 2.9 million) and was issued a past performance rating of *Good*.

IBSI argued in its protest that DNA's excellent past performance rating was unreasonable because DNA had no direct experience furnishing and installing telephone systems. The contracting officer (CO) reevaluated and issued a *Neutral* rating to DNA in accordance with the RFP. In reevaluating IBSI's proposal, the CO identified two references directly applicable to the solicitation. She based her review on only one reference because the second reference, involving the installation of a similar telephone system at a VA Medical Center in Massachusetts, was not included because the individual within the agency responsible for completing the reference form failed to do so. With only the one reference, IBSI was again given a *Good* past performance rating.

The CO then determined that a *Neutral* rating (DNA) was essentially equal to one *Good* rating (IBSI) and DNA's lower price held sway.

IBSI argued that the agency was required to consider the second reference (its installation of the Massachusetts Medical Center telephone system). VA countered and GAO supported the assertion that there was no legal requirement that all past performance references be included in a valid review of past performance. The winning factor for IBSI was in the fact that the very same agency, contracting officer, and same services were involved in the contract award and administration of the telephone installation at the Massachusetts VA Medical Center (missing second reference). In fact, the contracting officer stated that IBSI's performance had been "exemplary" in a letter written four months prior to the award decision regarding the Pennsylvania VA Medical Center. Under these circumstances, GAO held that the agency knew of the past performance and unreasonably failed to consider IBSI's positive performance in the second reference.

Even though GAO found the VA evaluation of IBSI's past performance to be unreasonable, competitive prejudice was an essential element that had to be established before the improper evaluation would be sustainable. GAO concluded that IBSI was likely prejudiced by the agency's failure to include the past performance in the second reference (VA Medical Center in Massachusetts). The "exemplary" performance by IBSI would have likely garnered at least a rating of *Good*. The agency would then have to

weigh IBSI's two *Good* ratings against DNA's one *Neutral* rating. This change in past performance references could have resulted in a different selection. GAO recommended a reevaluation of the proposals including IBSI's two references. [Ref. 10]

## **2. Mechanical Contractors, S. A.**

Like IBSI, *Mechanical Contractors, S. A., B-277916, Comptroller General of the United States, 27 October 1997, (MECSA)* was sustained because of an error by the Federal agency. MECSA protested the Panama Canal Commission (PCC) award of a firm fixed-price contract for cleaning and painting of four miter gate leaves in the Panama Canal. The RFP called for abrasive blast cleaning and exterior painting above and below the water line using hot-applied coal tar enamel. The PCC found Formal Management Systems, Inc. (FMS) to be the offeror whose proposal offered the best value to the Government.

The RFP required all offerors to submit a technical proposal and price schedule. The technical proposals were to be evaluated under two equally weighted factors: technical approach and performance capability. Performance capability was divided into five sub-factors including specialized experience and past performance. The total technical evaluation scores were to be weighted equally with the offerors' firm fixed-price in an effort to determine the best value to the Government. Three proposals were received including those of MECSA and FMS.



MECSA proposed the lowest price of \$ 2.5 million while FMS submitted a price of \$ 2.6 million. The key difference between the two offerors existed in the performance capability factor. FMS earned 81.55 points in performance capability. MECSA earned 66.2. Past performance was the significant difference in the two proposals because PCC awarded the contract to FMS even though MECSA proposed a lower price. The evaluation record showed that FMS had successfully cleaned and coated all PCC miter gates for the previous three years. MECSA had weaknesses in experience and past performances as the agency stated they had very little coal tar enamel work over the same three years.

MECSA argued that PCC's evaluation of its and FMS's past performance was unreasonable. Offerors were to list similar projects over the past three years. The Evaluation Board reviewed 17 contracts and concluded that three (18 percent) showed either late completion or liquidated damages. The board stated that MECSA had been late on "various projects" and awarded MECSA only a 50 percent score in past performance. GAO found the reasonableness of the score in doubt. According to PCC's post-protest submissions, only five contracts should have been considered similar with one (20 percent) being late. It is important to note that although the performance was cited as late, MECSA received an overall performance rating of *Satisfactory* in this similar contract. PCC maintained that under the streamlined number of contracts, MECSA's rate of late performance rose from 18 to 20 percent and their decision would

have remained unchanged. However, GAO held that with only one suspect similar contract, the key downgrading statement regarding late performance on “various projects” was now unsupported and unreasonable.

In contrast, PCC’s evaluation of FMS’s past performance appeared inconsistent with the evaluation of MECSA. MECSA pointed out that FMS had serious, documented safety violations (including a fatality) on previous projects that had no affect on its past performance score. PCC stated that the proposal did not disclose the information, and the Evaluation Board did not weigh these facts. However, GAO queried the board regarding the fatal safety violation to which the members stated that they did have knowledge about the incident at the time of the evaluation. During the protest, PCC reevaluated FMS’s proposal, taking the safety violations into consideration, and still maintained that FMS represented best value for the Government.

MECSA also argued that FMS had not been as successful when cleaning and painting miter gates as they had originally maintained in their proposal. MECSA pointed out that in still another contract, FMS received an unsatisfactory performance rating in a safety area. PCC maintained that since FMS had garnered a satisfactory performance rating for the entire contract, it was reasonable that the safety problem should have no affect on the past performance rating. GAO disagreed stating that this approach seemed inconsistent with the downgrading of MECSA for late performance under their one late contract in which the overall performance rating had been satisfactory.

As to a determination of prejudice, GAO stated that PCC's reevaluation of the specialized experience of FMS—taking into account the fatal safety violation—resulted in only a small difference in overall adjectival point scores (1.2 points). In light of the protester's lower proposed price, GAO determined that MECSA would have had a substantial chance of receiving the award. GAO held that the presence of the multiple material errors in the evaluation of past performance and technical merit (to be discussed in a later chapter) did prejudice MECSA. Consequently, GAO recommended reevaluation. [Ref. 11]

### **3. NavCom Defense Electronics, Inc.**

*NavCom Defense Electronics, Inc., B-276163, Comptroller General of the United States, 19 May 1997, (NavCom)* was similar to *IBSI* and *MECSA* because agency miscues regarding past performance resulted in sustainment of the protest. NavCom protested the U. S. Air Force's award of a firm fixed-price contract for repair of over 104 line items in their AN/ARN-118 Tactical Air Navigation (TACAN) systems. The contract competition was a total small business set aside for one base year and four one-year options. The Air Force found Integrity Air Services, Inc. (IAS) to be the offeror whose proposal was determined to be most advantageous to the Government.

The TACAN system is a complex collection of five major components: (1) a radio receiver/transmitter; (2) a radio receiver transmitter control; (3) a digital to analog adapter; (4) an antenna; and (5) a mount. The system contains over 15,000 sub-

components. The RFP stated two evaluation factors—performance and price—were of equal importance and best value would be determined through a performance/price tradeoff. Eight proposals were received. Under price, IAS ranked first with the lowest proposed price and NavCom ranked fourth. The RFP required offerors to forward information regarding current and past performance on “the same or similar” efforts. Past performance was evaluated as *Low*, *Medium*, or *High* risk. All offerors earned risk scores of *Low* regarding past performance as the Air Force determined that all firms had the desired “similar or same” experience with the TACAN system. With equal past performance ratings, the lower priced proposal by IAS won the award.

NavCom protested asserting that IAS did not have “same or similar” past performance and should have received a risk rating of other than *Low*. IAS past efforts consisted of only four contracts to repair radio power supplies, and none of the contracts were valued at greater than \$ 1 million. Power supplies were not a line item for repair in the RFP. However, the solicitation did state that the contractor must possess knowledge of direct and alternating current circuitry, analog and digital signals, timing networks, high frequency networks and electronics, pulse width decoding, synchro technology, built-in test circuitry, operation of systems bearing and distance measurement signals, radio receiving technology, and pulsed transmission technology. [Ref. 12]

In contrast, NavCom was the only offeror with satisfactory, direct experience with the TACAN system. NavCom’s previous TACAN contract was valued at over \$ 8

million. The Air Force acknowledged that the performance risk assessment team was fully aware of NavCom's past experience; moreover, they were equally aware that the remaining offerors had no actual TACAN experience. Still, all offerors received performance risk ratings of *Low*. GAO stated that the record lacked any basis upon which the Air Force could reasonably conclude that IAS's repair of power supplies was "similar or same."

The Air Force stated that consideration was made to the fact that this was a 100 percent small business set-aside. They maintained that very few small businesses have experience with contracts the size of the TACAN effort. Consequently, it became a question of policy whether to award contracts to small business to expand the contracting base. GAO stated the goal of contracting base expansion does not allow the agency to disregard the terms of the RFP. GAO concluded by stating that only NavCom had the "same" experience with the TACAN, and the agency provided no evidence in the record establishing that IAS had "similar" experience. GAO could not conclude that the award to IAS was reasonable, and they found that NavCom had been prejudiced. GAO sustained the protest and recommended reevaluation. [Ref. 12]

#### **D. FAILURE TO CONDUCT MEANINGFUL DISCUSSIONS REGARDING ADVERSE PAST PERFORMANCE REPORTS**

Three of the six protests in which improper evaluation past performance was a sustaining argument hinged on agency failure to conduct meaningful discussions

regarding adverse past performance reports. It is important to note that the mere absence of required meaningful discussions about adverse past performance reports, when required, is by itself a sustainable argument.

**1. American Combustion Industries, Inc.**

*American Combustion Industries, Inc., B-275057.2, Comptroller General of the United States, 5 March 1997, (ACI)* was a protest in which an agency failure to hold discussions resulted in a protest sustainment. ACI protested the Department of Commerce's National Institute of Standards and Technology's (NIST) award of a fixed-price construction contract for two boilers and boiler housing. The contract was for all labor, equipment, and material for the supply and installation of two 82,000 pounds per hour boilers and construction of an addition to an existing building to house the boilers. NIST determined that Green Contracting Company, Inc. (GCC) offered a proposal representing the best value to the Government.

The RFP established six evaluation factors, three of which involved past performance. Past performance factors carried a total assigned weight of 70 percent.

1. Past Performance on Building Construction (30 percent)
2. Past Performance on Phased Refurbishing (20 percent)
3. Past Performance of Personnel (20 percent)

GAO noted improprieties in the evaluation of the past performance of personnel, and this will be discussed in a later chapter involving improper evaluation of labor qualifications.

The clear past performance impropriety in this protest occurred in the agency's attempt to evaluate the past performance on building construction. The RFP required offerors to provide references on past construction projects. In accordance with the RFP, ACI identified two construction projects. One was with the National Aeronautics and Space Administration (NASA) and the other with James Madison University (JMU) in Virginia.

NASA advised the agency that ACI was at least 100 days late in beginning work and that they had problems with the firm's project manager. JMU reported that the protester was five months late due to slow delivery of a boiler, in part, because of ACI. The JMU reference was otherwise positive. The agency held discussions with ACI regarding NASA but not JMU. The agency stated that FAR 15.610(c)(6) anticipated an eventual implementation of a Government past performance reporting network. [Ref. 13] NIST further stated that the FAR requirement to discuss adverse past performance was not in effect until the past performance reporting network was implemented. GAO rebuked this notion stating that the FAR plainly mandated an opportunity for offerors to reply to adverse past performance information. [Ref. 14]

The protester also alleged improper evaluation of past performance regarding their project manager. The solicitation required the offerors to identify certain key personnel who would be involved in the boiler/boiler housing work. ACI identified a project manager who was regarded highly by the agency. However, the proposed project manager did not appear (as requested by the agency) at discussions conducted by NIST.

Since the proposed project manager was unavailable for the discussions, ACI sent its president and vice-president in his place. Although the transcript of the discussions showed different understandings about what was said regarding the project manager's absence, the agency was concerned that the vice-president in attendance would be substituted for the project manager for the initial months of contract performance. The evaluation record showed several key facts:

1. The vice-president who was assumed to be a replacement for the project manager was viewed as a poor choice because of negative references.
2. NIST did not discuss its concerns during the discussions.
3. ACI did not amend its proposal to show a replacement of the proposed project manager with the vice-president.
4. NIST deducted points from ACI under the past performance of personnel category.

GAO held that the agency's failure to advise ACI of their project manager assumption unreasonably denied the protester a chance to resolve the question about personnel availability. Given that a major deduction from ACI's score was due to the perceived substitution with the vice-president, GAO held that the protester had been prejudiced. GAO also held that the ACI was prejudiced by the lack of discussions regarding JMU. GAO recommended discussions, revised BAFOs, and reevaluation.

[Ref. 14]



## **2. McHugh/Calumet, A Joint Venture**

*McHugh/Calumet, A Joint Venture, B-276472, Comptroller General of the United States, 23 June 1997, (McHugh) like ACI, was a protest that was sustained because discussions were not held about poor past performance references. McHugh/Calumet protested the General Services Administration (GSA) award of a fixed-priced contract for construction of a new Federal courthouse in Hammond, Indiana. GSA found Huber, Hunt, & Nichols, Inc. (HHN) to be the offeror whose proposal was determined to be most advantageous to the Government.*

The RFP called for the construction of a 270,000-square foot, four-story, limestone courthouse containing seven courtrooms, Federal office space, a cafeteria, and a firing range. The evaluation elements were price and technical factors. Each element was weighted equally. The technical factors consisted of (1) quality control—40 percent; (2) past performance on similar projects—35 percent; and (3) key personnel qualifications—25 percent. Regarding price, McHugh's proposal of \$ 49 million was lower than HHN's by over a million dollars. GSA felt that McHugh's past performance on similar projects was lacking compared to HHN's. The RFP required one-page descriptions and references for projects of similar scope completed in the last five years. HHN had satisfactorily worked on three courthouses with "directly comparable" or "very similar" architectural (wood paneled courtrooms) finishes. McHugh had constructed no courthouses during the five-year period, and the descriptions that they submitted were

seen to be only “similar” by GSA. McHugh did list two courthouses from before the five-year period which GSA found to be “not nearly similar” because they did not have the same level of quality finishes.

HHN’s overall advantage was based not only on greater similarity in projects but on better past working relationships. HHN received scores of *Above Average* for working relationships on two submitted references and a score of *Outstanding* on a third.

McHugh had two scores of *Outstanding* and one *Below Average*. Discussions were not held regarding the below average score because it was an internal agency reference, and GSA maintained that the FAR 15.610 (c)(6) requirement for discussions applied only to third party references. GSA also stated that internal agency references were clear and not subject to interpretation, so discussions would be pointless. GAO found no basis why FAR 15.610 (c)(6) would not apply in this case by stating that nothing in the FAR limits its application to a third party. [Ref. 13] GAO also found that McHugh had been prejudiced because discussions would have furnished McHugh the opportunity to contend that the poor reference was a personality conflict and not performance related. In light of the lower price, close competition, and scores of *Outstanding* on the other references, GAO held that McHugh had a reasonable chance of obtaining award if they were afforded the opportunity to refute the poor internal agency reference. GAO recommended discussions, revised BAFOs, and reevaluation. [Ref. 15]

### **3. ST Aerospace Engines Pte. Ltd.**

*ST Aerospace Engines Pte. Ltd., B-275725, Comptroller General of the United States, 19 March 1997, (STA Engines)* is a protest involving the poor past performance of an affiliate as well as a failure by a Federal agency to hold discussions. STA Engines protested the Department of Transportation's U. S. Coast Guard (USCG) award of a contract for the overhaul and repair of helicopter reduction gearboxes and torquemeters used in the T-56 engines of C-130 aircraft. USCG found Standard Aero Ltd. (Standard) to be the offeror whose proposal was determined to be the best value for the Government.

The RFP stated that the responsible offeror with the best price/technical merit combination would be found to be the best value offeror and obtain the award. Technical merit consisted of (descending order of importance) past performance, certification, industrial capability/capacity, warranty, and engineering and support capability. The evaluators stated that STA Engines was downgraded primarily due to concerns about the company's past record of late delivery. USCG pointed out that the protester's past performance was for the most part good except for significantly late deliveries of overhauled ship propellers under a separate USCG contract.

STA Engines maintained that the negative past performance rating was unreasonable because they had not participated in the contract in question. STA Engines asserted that it was their affiliate ST Aerospace Systems (STA Systems) that had performed poorly. STA Engines further maintained that had they the opportunity to

discuss the poor report, they could have vindicated themselves and won the award. USCG countered stating that STA Engines proposal had held the two as affiliated and even forwarded the propeller contract as a reference. GAO stated that affiliation alone was not a deciding factor regarding STA Engines. GAO pointed out that the relationship between the two was key. The critical question was whether the workforce, management, facilities, or other resources of one company may affect the contract performance of the affiliate.

GAO held that the agency had provided no evidence that the past performance of STA Systems was of any relevance to the potential contract performance of STA Engines. Furthermore, the agency was required to raise the issue of the affiliate's performance and relationship with STA Engines during discussions. Specific weaknesses should have been pointed out. Had the discussions been held, STA Engines would have been able to challenge any negative past performance of any of the other units in the parent company--ST Aerospace Group. GAO held STA Engines was prejudiced by both the improper attribution of an affiliate's negative past performance and the failure of USCG to hold meaningful discussions. GAO recommended discussions, revised BAFOs, and reevaluation. [Ref. 16]

#### **E. ANALYSIS AND CONCLUSION**

The purpose of this analysis is to give the contracting officer an indication of the common pitfalls when evaluating past performance in best value contracts.

# **1. Follow the Solicitation in a Consistent Manner**

It is clear in several protests that failure to follow the solicitation's evaluation scheme led to the improper evaluation of past performance and sustainment. *NavCom* is a good example. In this protest, we see that an RFP placing emphasis on "same or similar" past performance must be followed. The RFP was clear in this case where past TACAN experience was required, yet the contracting officer seemed to arbitrarily judge every offerors' past performance as equal (low risk). GAO held that the agency evaluation was not consistent with the solicitation. This decision stemmed from the fundamental requirement for agency evaluations to be reasonable and consistent with stated evaluation criteria. GAO cited a previous decision in support of their finding (*Ogden Support Services, Inc., B-270012.2, 19 March 1997*).

*NavCom* also shows us that circumventing the RFP for unstated policy goals (e.g. increasing the industrial base) is not supported by the Comptroller General. In this protest such a goal existed, but the RFP contradicted the goal by placing a high premium on "same or similar" past performance. The Federal agency could not both follow the RFP and achieve their goal of increased industrial capacity. GAO held that the agency evaluation was unreasonable. Their holding stemmed from the Comptroller General's assertion that the agency cannot disregard the terms of the RFP in evaluating an offeror's proposal—even though the agency has an outlying goal of industrial base expansion. The implication from *NavCom* is twofold. First, contracting officer judgment is often

supported by GAO, but the contracting officer must be reasonable, consistent, and in accordance with the RFP. Second, peripheral agency goals do not absolve the contracting officer from the requirement to adhere to the solicitation. If an increased industrial base is the priority, then the RFP should allow for inexperience and place less the emphasis on past performance. However, there is a risk of poor or non-performance with this strategy. CICA certified Congress' intent to maximize competition, but the contracting officer is bound to evaluate the proposals reasonably and consistently in accordance with the RFP.

## **2. Make Use of Relevant, Known Facts About Offerors**

*MECSA* demonstrates problems with agency use of relevant data. The awardee in this protest had several previous safety violations that were known to the evaluation board. Still, the agency chose to ignore the violations and did not downgrade the offeror. The key here is relevance. GAO found that in the dangerous activity of blasting, preserving, and painting Panama Canal miter gates above and below the water line, safety was a relevant issue. The evaluation board ignored these facts in its past performance evaluation, and it was a sustaining argument for the protester. GAO held that the Federal agency was not consistent in its evaluation. The holding was rooted in a previous decision (*Boeing Sikorsky Aircraft Support; B-277263.2, B-277263.3; 29 September 1997*) that stated offerors must receive the fair and considered judgment of the agency. The implication for the contracting officer is that inconsistency in application of evaluation criteria is an obvious but fatal flaw in past performance evaluation.

*IBSI* reinforces this theme. This protest exposes the disregarding of known, positive information by an agency that could have helped the protester. Not only had the Veteran's Administration (VA) improperly given the awardee a good past performance rating in the light of no direct experience, but an agency employee forgot to fill out a reference form and reduced the protester's pool of positive references from two to one. It is important to note that in *IBSI*, the mistake by the agency was not the cornerstone to sustainment. There is no legal requirement that all past performance references be included in a valid evaluation. Rather, the fact that the missing second reference involved the same services, Federal agency, and contracting officer caused the Comptroller General to find that the previous "exemplary" performance of the protester was a known fact to the VA. GAO held that it was unreasonable for the Federal agency to ignore this known and relevant past performance. The Comptroller General supported its decision by citing a previous protest sustainment (*Marine Diesel, Phillyship; B-232619, B-232619.2; 27 January 1989*) where the Navy chose not to consider unsatisfactory past performance of an awardee involving similar services and the same command because the awardee did not include the controversial contract on its list of references. The implication for the contracting officer is that an agency cannot simply choose to ignore relevant information. The failure to utilize relevant data could result sustainment.

Relevance is a double-edged sword. In *STA Engines*, the USCG applied irrelevant past performance data about an affiliate and unreasonably penalized the protester. This is

not to say that the performance of affiliates is always irrelevant. GAO stated that the relationship determines the relevance. If the resources and actions of one affiliate can affect the potential contact performance of another, then the affiliate's past performance—positive or negative—is relevant. GAO held that the agency had not demonstrated that the past performance of the protester's affiliate was relevant. The holding stems from a previous protest (*Contract Services Co., Inc., B-246604.2, 11 June 1992*) where GAO stated that it would be inappropriate to consider the affiliate's record where that record did not bear on the likelihood of successful performance by the protester. The implication for the contracting officer is that an affiliate's past performance must be carefully screened for relevance. Relevant past performance data should be used, and irrelevant data should be disregarded.

### **3. Hold Discussions Regarding Negative Past Performance**

Discussions regarding poor past performance references must be held to give the offerors an opportunity to explain the situation. This was a frequent, sustaining error by Federal agencies in three protests. *ACI* shows that although the FAR is and was clear in this matter, mistakes can be made. The agency (NIST) held discussions with the protester regarding a poor reference from NASA but elected not to do so regarding James Madison University (JMU). The reason was the agency's perceived delay in the FAR's requirement to discuss poor references until an anticipated past performance reporting network was implemented. GAO held that discussions were required. This finding was



rooted in the fact that the FAR (15.610) was clear, and the absence of the anticipated reporting network in no way relieved a Federal agency from its duty to inform an offeror of a poor past performance report. The implication for the contracting officer is that poor past performance reports must be addressed to the offeror to provide an opportunity for comment.

*McHugh* demonstrates that an assumption about the source of a reference can be troublesome. GSA believed the requirement to discuss a negative past performance existed only for third party references. Internal agency references were assumed to be clear and not subject to interpretation; therefore, discussions were pointless and not required. However, the Comptroller General found no basis why the FAR requirement for discussions would not apply in this case and sustained the protest. This holding stated that nothing in the FAR limited the application of the requirement for discussions to third party references. Contracting officers should be wary of past performance information that they consider indisputable (e.g. intra-agency references). The source of a poor report does not affect the contracting officer's requirement to provide the offeror with a chance to address the situation.

As previously stated, *STA Engines* demonstrates that an affiliate's past performance may not necessarily be relevant to a sister company's ability to perform the terms of a contract. *STA Engines* also shows us that the holding of discussions may have precluded the improper use of the affiliate's past performance. *STA Engine's* had not

been given the opportunity to respond to the agency's contention that their affiliate's performance was relevant to their ability to perform. If discussions had been held, the problem may have been averted. In any case, GAO held that the lack of discussions was a sustaining argument for the protester. GAO bolstered its holding by citing a previous protest (*Alliant Techsystems, Inc., Olin Corporation; B-260215.4, B-260215-5; 4 August 1995*) that stated for discussions to be meaningful, an agency must point out significant weaknesses in a proposal that would prevent the offeror from having a reasonable chance for award. The contracting officer must realize that discussions assist the agency by identifying potential improprieties in the evaluation before award is made. Had discussions been held, objections by the protester could have caused the agency to review the situation further and make proper evaluation decisions.

A final observation can be drawn regarding required discussions. In two of the three cases, the Federal agencies maintained that the protester knew about the poor past performance and that their knowledge released the agencies from their obligation to hold discussions. In both cases, GAO held that knowledge of negative past performance was not the issue. GAO indicated that contracting officers must inform an offeror of the impact of the reference. Federal agencies must state if an offeror's past performance detracts from their ability to win the award. Discussions (communications) must be held.

Contracting officers should take many valuable lessons from this chapter. Consistent, relevant, evaluation of a proposal in accordance with the solicitation is

crucial. Underlying policy goals do not allow a Federal agency to disregard the terms of a RFP. All known facts within the confines of the evaluation criteria must be used when considering past performance. Irrelevant facts must be excluded. Finally, discussions must be held to afford each offeror an opportunity to refute a negative past performance report even if the offeror is aware of the poor reference.



## V. TECHNICAL MERIT

### A. INTRODUCTION

Evaluation of technical merit is a cornerstone of best value tradeoff and source selection. Current regulation dictates that when tradeoffs are performed, the source selection records shall include (1) an assessment of each offeror's ability to accomplish the technical requirements and (2) a summary, matrix, or quantitative ranking along with appropriate supporting narrative of each technical proposal using the evaluation factors. [Ref. 1: 15.305(a)(3)] This chapter focuses on Federal agency technical assessment, ranking, and supporting narratives when evaluating proposals in an effort to make best value awards. The seven protests in which improper evaluation of technical merit was a sustaining argument are *Cygnus Corporation*; *HG Properties A, L. P.*; *J. A. Jones Management Services, Inc.*; *JW Associates, Inc.*; *International Data Systems, Inc.*; *Mechanical Contractors, S. A.*; and *Technology Services International, Inc.* The seven protests are divided into two categories:

1. Improper evaluation of technical merit;
2. Improper evaluation of technical merit combined with inadequate supporting documentation.

This chapter discusses the differences in governing regulations as a result of the FAR Part 15 rewrite, outlines the seven sustained protests, and provides analysis and conclusions regarding the reasons for sustainment.

## **B. TECHNICAL MERIT AND FAR PART 15**

Only a few of the FAR requirements regarding technical evaluation changed due to the Part 15 rewrite. One key difference is the requirement for appropriate supporting narrative to accompany the previously required summaries (strengths, weaknesses, and basis for award), matrices, and quantitative rankings when making a best value source selection. The FAR Part 15 rewrite states that the rationale for tradeoffs must be documented in the contract file. While the stated requirement for tradeoff rationale was not in force at the time of these protests, it appears that GAO may have intended to send a message regarding the importance of these narratives when they firmly stressed the need for supporting information in three of the protest decisions. [Ref. 1: 15.101-1]

In a separate issue, the Part 15 rewrite encouraged open exchanges (clarifications, negotiations/discussions, and communications) in an effort to achieve best value. The term communications was added to allow better dialog leading the establishment of competitive ranges. Clarifications and discussions remained essentially unchanged in their definition and application. The distinction between clarifications and discussions is a key element in one of the protests in this chapter. It is important to note that clarifications are limited exchanges of information to clarify ambiguities when award

without discussions is contemplated. Discussions are negotiations after the establishment of the competitive range. Discussions are required to be meaningful by indicating significant weaknesses, deficiencies, and other aspects that could be altered so that an offeror may materially enhance the potential for award. Unlike clarifications, discussions may result in an offeror modifying their proposal. [Ref.1: 15.306]

## **C. IMPROPER TECHNICAL EVALUATION**

### **1. Cygnus Corporation**

*Cygnus Corporation, B-275181, Comptroller General of the United States, 29 January 1997, (Cygnus)* is a protest where GAO held a Federal agency evaluation of technical merit was improper; consequently, the Comptroller General issued a sustainment. Cygnus Corporation protested the Department of Health and Human Services (HHS) award of a cost-plus-fixed-fee contract for the operation and management of the National Adoption Information Clearinghouse. The RFP reserved the award for small businesses and outlined one base year with two, one-year options. HHS determined the proposal of Caliber Associates, Inc. (Caliber) to represent the best value to the Government.

The RFP stated that the combination of the quality of the technical proposal and past performance was of more importance than proposed cost. The solicitation identified five criteria for evaluation: (1) quality of technical approach—30 points; (2) staff qualifications—20 points; (3) adequacy of manpower, resources, and management plan—

20 points; (4) understanding of the statement of work—15 points; and (5) corporate experience—15 points. HHR received six proposals and found three to be within the competitive range. Caliber scored higher than Cygnus, and based on the results of the initial and BAFO scores, the agency contract specialist prepared a Negotiations Summary Memorandum recommending award of the contract to Caliber. Caliber received the award, and Cygnus protested.

Cygnus argued that HHR improperly downgraded their proposal in the *Quality of Technical Approach* factor because the agency failed to consider added information from the protester. The RFP required the offerors to provide an indication of possible problems they may encounter in the performance of the contract as well as possible resolutions. Cygnus failed to provide this information in their proposal. The agency report stated that the omission of this information was the main factor causing deduction of points from Cygnus' score. The agency did not hold discussions because they stated that such discussions would result in technical leveling. However, Cygnus did include the required information in their BAFO. The record showed that Cygnus' score was not adjusted after the receipt of their BAFO. The evaluator stated that the information on the BAFO was evaluated but was not sufficient to change the score. GAO was skeptical. The score sheets still contained narrative stating that no discussions were held about the missing information regarding potential problems. The record provided neither acknowledgment of receipt of the information nor evidence of its use in evaluating the



BAFO. For this reason, GAO held that the HHR evaluation of Cygnus' proposal was unreasonable and that they were prejudiced because the omitted information constituted the main deduction from their score. GAO sustained the protest and recommended reevaluation of Cygnus' BAFO and comparison to the other offerors' BAFOs. [Ref. 19]

## **2. Matter of HG Properties A, L.P.**

Like *Cygnus*, *HG Properties A, L. P.*; B-277572, B-277572.2, B-277572.3; *Comptroller General of the United States*, 29 October 1997, (HG) is a protest that was sustained because of improper technical evaluation by a Federal agency. HG Properties protested the U.S. Forest Service award of a contract for over 20,000 square feet of office space for a Forest Service supervisor's office located 2.5 miles from Libby, Montana. The Solicitation for Offerors (SFO) anticipated a 10 year lease with two, five-year options. The Forest Service found that Mountain States Leasing-Libby (MSL) offered a proposal representing the best value to the Government.

The SFO contained specifications outlining the requirements of the building (architectural, mechanical, electrical, plumbing, utilities, maintenance, and service requirements). One written requirement was that the computer room space must be located away from areas housing microwave equipment and radio transmitters. A drawing was provided--not to dictate design--but to show desired space relationships and predicted traffic patterns. The SFO also stated that if any inconsistency between the written requirements and the conceptual drawing existed, the written requirements would

govern. Finally, the award would be made on a best value basis, and technical evaluation factors were equal to price. Price evaluation was to be on the basis of total annual price per square foot of occupiable space.

HG offered a lower price per square foot of \$ 12.90. MSL offered \$ 12.93. However, MSL's overall point total was better than HG's (846 (MSL) compared to 757 (HB)—1000 point maximum). The higher point total for MSL was primarily due to their high score for efficient layout. HG was downgraded because under their layout, supplies could not easily be moved. The agency determined that MSL's offer met all aspects of the SFO while HG's did not meet the basic floor plan. In fact, MSL's layout was very close to the sample layout in the SFO. The agency found that the cost difference between MSL and HG was minimal, so MSL was awarded the contract even though they proposed a higher price per square foot. HG protested.

HG argued that the Forrest Service failed to evaluate MSL's proposal as required in the SFO. Specifically, MSL's layout did not meet the requirement of separating the computer room from the telecommunications room. On the contrary, the computer room was actually contained within the telecommunications room. The agency stated that MSL had simply followed the layout in the SFO and that the minimal needs of the agency were represented in the drawing. However, the written direction in the SFO was for separation of the computer room from telecommunication and microwave equipment.

According to the SFO, the written direction was overriding in the event of a discrepancy with the conceptual drawing.

GAO held that MSL's proposed layout was not rational and in accordance with the stated evaluation criteria (written requirements). The Comptroller General found that HG had been prejudiced because they had the lower price per square foot and a layout that matched the SFO written direction. GAO recommended that the Forest Service amend their solicitation to reflect their actual minimum needs regarding the location of the computer room, reopen negotiations with competitive range offerors, and allow them to respond to the amended SFO. [Ref. 20]

### **3. International Data Systems, Inc.**

*International Data Systems, Inc., B-277385, Comptroller General of the United States, 8 October 1997, (IDS)* is a protest brought because the agency improperly evaluated the technical merit of a delivery schedule and also failed to disclose proposal problems during discussions. International Data Systems protested the Department of Interior (DOI) award of a fixed-price, indefinite delivery/indefinite quantity contract for personal computers. The contract time period was to span six months. DOI found Applied Computer Technology (ACT) to be the offeror representing the best value to the Government.

The RFP stated that a Technical Evaluation Panel (TEP) would consider the following evaluation criteria: conformance with technical specifications—40 percent,

past performance—40 percent, and price—20 percent. Discussions were not to be held. Forty-two offers were received with only seven in the competitive range. The TEP ranked all seven finalists with the protester earning first-place and ACT second. The contracting officer reviewed the seven proposals in greater detail and discovered that the protester offered a 30-45 day delivery schedule. The RFP called for a 15-day delivery. When establishing the competitive range, the contracting officer had previously rejected other proposals that did not meet delivery requirements. She left the protester in the competitive range but did not inform them of the delivery problem. Up to this time, the contracting officer believed that she had held only clarifications with the offerors in the competitive range. She decided not to inform the protester about the schedule problem in order to avoid holding discussions and delaying the procurement. The DOI found ACT's proposal to be the best value and awarded them the contract. International Data Systems protested.

IDS argued that the agency's unwillingness to inform them of the problem constituted a failure to hold meaningful discussions. IDS maintained that if the problem had been brought to their attention, it could have been immediately remedied because they stated it was simply a typographical error. DOI countered that they had engaged in clarifications with the seven offerors and not discussions. Consequently, IDS was not entitled to discussions. The governing regulation (FAR Part 15—pre-rewrite) permitted contracting agencies to award on initial proposals without discussions provided that the

solicitation made the situation clear. Clarifications were defined as communications with an offeror for the sole purpose of eliminating irregularities or apparent clerical mistakes in a proposal. Discussions involved essential information for determining the acceptability of a proposal or provided the offeror an opportunity to revise the proposal. Unlike discussions, clarifications do not give an offeror the opportunity to make proposal revisions.

GAO held that the clarifications held by the agency with some of the offerors were actually discussions for two reasons. First, the communications concerned information essential for determining the acceptability of the offerors' proposals. Second, the offerors were given an opportunity to submit BAFOs thereby modifying their proposals. The fact that discussions were held meant that DOI was obligated to raise the schedule issue with IDS. When discussions are held, they are required to be meaningful. Discussions are not meaningful unless they address aspects of an offeror's proposal that must be corrected for the offeror to have a reasonable chance of obtaining award. GAO held that meaningful discussions were required but not held with IDS because the erroneous delivery schedule had not been addressed. GAO stated that the lack of required, meaningful discussions coupled with an improper pre-award change by the agency (discussed in a later chapter) prejudiced IDS. The protest was sustained. Since the computers were already delivered and accepted, GAO recommended reimbursement of proposal and protest costs to IDS. [Ref. 21]

#### **4. Technology Services International, Inc.**

*Technology Services International, Inc., B-276506, Comptroller General of the United States, 21 May 1997, (TSI)* is a protest in which a proposed scheduling system is successfully challenged. Technology Services protested the U.S. Air Force award of a fixed-price contract for grounds maintenance services at Hickam Air Force Base, Hawaii. The contract was for a six-month base period with five option years. The Air Force determined Oahu Tree Experts (OTE) to be the offeror representing the greatest value to the Government.

The RFP defined this as a performance based contract with a best value evaluation scheme consisting of the following criteria:

1. Technical (Grounds Maintenance)
  - Quality Control
  - Equipment, Material, and Supplies & Work Procedures
  - Customer Service
2. Management (Manpower Planning)
3. Past Performance
4. Price

The first three criteria were equally weighted, and in combination, were outlined to be more important than price.

OTE received an *Unacceptable* rating in Technical (Grounds Maintenance)—Quality Control because the offeror did not include a work scheduling system as required by the RFP. OTE informed the agency that such a schedule would be developed. As a result of this promise, OTE received an *Exceptional* rating (highest possible) in Quality Control. OTE and TSI received similar ratings in the various evaluation criteria. OTE's proposed price of \$4.8 million was nearly \$2 million less than the protester's \$6.5 million. Both proposals were found to be essentially equal from a technical perspective, so OTE's lower price won the contract award. Technology Services protested.

The protester argued that the agency technical evaluation of OTE's proposal was unreasonable. The protester maintained that OTE's BAFO did not provide a work scheduling system that met the requirements in the RFP. Their system failed to show the day and time that the work was to be performed. The Air Force countered that OTE had promised to develop such a schedule and that their promise was satisfactory. GAO disagreed. The solicitation stated that an *Exceptional* rating was supposed to indicate that a proposal had exceeded the standards outlined in the RFP. GAO held that the assignment of such a high rating was unreasonable. Moreover, the Comptroller General stated that they could not conclude that the two proposals were technically equal. GAO sustained the protest and recommended that OTE's contract be terminated and awarded to TSI. [Ref. 22]

**D. IMPROPER EVALUATION OF TECHNICAL MERIT COMBINED  
WITH INADEQUATE SUPPORTING DOCUMENTATION**

**1. Mechanical Contractors, S. A.**

*Mechanical Contractors, S. A., B-277916, Comptroller General of the United States, 27 October 1997, (MECSA)* is discussed in Chapter IV because one sustaining argument involved improper evaluation of past performance. *MECSA* was also sustained because of an error by the Federal agency in evaluating technical merit. Mechanical Contractors protested the Panama Canal Commission (PCC) award of a firm fixed-price contract for cleaning and painting of four miter gate leaves in the Panama Canal. The RFP required all offerors to submit a technical proposal and price schedule. The technical proposals were to be evaluated under two equally weighted factors: technical approach and performance capability. The total technical evaluation scores were to be weighted equally with the offerors' firm fixed-price in an effort to determine the best value to the Government. *MECSA* proposed the lowest price of \$2.5 million while FMS submitted a price of \$2.6 million. Under technical approach, FMS earned a score of 72.7 points compared to 60.85 for *MECSA*. Despite *MECSA*'s lower price, FMS was awarded the contract.

The protester challenged the award arguing that the agency technical evaluation of its proposal was not adequately supported. There was very little contemporaneous supporting documentation regarding *MECSA*'s technical evaluation. Under technical



approach, the evaluation board stated only that MECSA had “very little coal tar enamel (CTE) experience over the past three years.” [Ref. 11]

Regarding the experience statement, the protester maintained that PCC failed to evaluate their proposal properly. The RFP stated that substantially equal importance would be given to an offeror’s CTE experience or an offeror’s possession of a special certification (SSPCat QP-2). The protester’s proposal outlined the use of a subcontractor holding this certification. The protester contended that since they (through their subcontractor) held the QP-2 certification, which was supposed to be substantially equal to CTE experience, their score for technical approach should have been essentially equal to FMS’s.

PCC countered that the solicitation did not guarantee equal or equivalent treatment of CTE experience and QP-2 qualification. PCC also asserted that the evaluation board did give favorable consideration to the subcontractor certification. GAO agreed that the evaluation board would have been reasonable for a slight downgrading of MECSA regarding their limited direct CTE experience. However, GAO held that the lack of contemporaneous supporting documentation cast doubt as to whether the evaluation board actually gave MECSA credit for the subcontractor certification. The only documentation that accompanied the numerical score stated “very little CTE experience.” GAO held that there was no evidence of consideration of the subcontractor certification. GAO held that the presence of the multiple material errors in the evaluation

of technical approach and past performance (Chapter IV) did prejudice MECSA.

Consequently, GAO sustained the protest and recommended reevaluation. [Ref. 11]

## **2. J. A. Jones Management Services, Inc.**

Like *MECSA*, *J. A. Jones Services, Inc., B-276874, Comptroller General of the United States, 24 July 1997, (Jones)* is a protest where the combination of improper technical evaluation and the lack of proper agency documentation resulted in sustainment. Jones Management Services protested the U.S. Army Corps of Engineers' award of a fixed-price contract for base repair and construction at the Bluegrass Army Depot in Lexington, Kentucky. The RFP called for offerors to submit their best price/cost and technical terms in the initial proposals because the agency intended to issue award without discussions. The contract was to be for an 18-month period with two option years. The U.S. Army Corps of Engineers (USACOE) found Intersteel, Inc. (Intersteel) to be the offeror whose proposal represented the best value Government.

The solicitation listed the following evaluation criteria (descending order of importance): (1) management ability; (2) subcontracting support capability; (3) related experience; (4) unit price coefficient; (5) technical staff capability; and (6) financial ability. Regarding price, each offeror was required to include a coefficient or percentage factor to be applied to specified fixed rates for various prices contained in a unit price book (enclosed with the RFP). Jones Management Services challenged the award stating that the majority of the technical point ratings were inaccurate, unsupported, or otherwise

improperly based on undisclosed evaluation criteria. Jones Management Services maintained that the agency evaluation and supplemental report provided explanations with information that was either cursory, missing, or "squarely at odds" with the proposal information. The record revealed that the only supporting documentation consisted of bullet statements annotated on the score sheets. In addition, the scant cursory narratives did not match the scoring deductions. The protester charged that strengths and weaknesses assigned to the offerors bore no relationship to the evaluation criteria outlined in the RFP. To further support its position, the protester pointed that the evaluation record did not reference a single paragraph of either the protester or the awardee proposals.

Regarding the allegation of inaccurate evaluation, the agency countered that the bullet narratives on the score sheets were only impressions and did not wholly represent the justification for the scores. However, GAO held that exclusion of these bullets left the agency with absolutely no supporting documentation. The Comptroller General held that the Corps of Engineers' evaluation was both inaccurate and unsupported by adequate documentation, narrative, or information. GAO continued stating: "Here, the dearth of evaluation narratives or other point scores, which have been sufficiently shown by the protester to be inaccurate in numerous areas, lead us to the conclusion that that the Source Selection Authority could not and did not make a reasonable selection decision ...the agency has offered no substantive response to the protester's concerns in response to the

protest.” GAO sustained the protest and recommended reevaluation of all proposals.

[Ref. 17]

### **3. JW Associates, Inc.**

*JW Associates, Inc., B-275209, Comptroller General of the United States, 30 January 1997, (JW)* is the third protest in this chapter where poor evaluation documentation was the basis for a sustaining argument. JW Associates protested the Forest Service award of a small business set-aside contract for an environmental impact statement for the Cold Springs Analysis Area on the Medicine Bow National Forest in Wyoming. The Forest Service determined that Natural Resources Management Corporation (NRMC) offered the proposal representing the best value to the Government.

The RFP listed five evaluation criteria in the order of importance (descending order of importance) with the first two categories termed as *Very Important* and the last three as *Important*:

#### Very Important

1. Qualifications of the Firm
2. Qualification of the Personnel

#### Important

3. Past Experience of the Firm and the Employees Assigned to the Project
4. Geographic Location
5. Price

The solicitation also stated that the award would be based on a technical/cost tradeoff within the pool of technically acceptable proposals. Each member of the evaluation board (made up of three forest service experts) assigned technical scores to the criteria for each proposal. The three scores were averaged for each offer, and the proposals were ranked. JW was the highest technically rated offeror but ranked sixth in price. NRMC ranked first in price. The board prepared a memorandum for the record containing a one-paragraph summary of each proposal. The contracting officer concluded that NRMC's proposal represented the best value to the Government and made the award. JW received a debriefing letter along with a copy of the awardee's technical proposal. JW protested.

JW argued that the Forest Service's evaluation of the offerors' technical proposals was improper and inconsistent with the evaluation criteria outlined in the solicitation. Under the most heavily weighted criterion *Qualifications of the Firm*, JW asserted that it had two recent timber sale environmental impact statements and was working on a third at the time of evaluation. JW also maintained that NRMC had no experience regarding environmental impact statements. JW concluded that its score for firm qualifications should have been greater than NRMC's score.

The agency stated that the evaluation was fairly performed and in keeping with the provisions in the RFP. In response to specific assertions by the protester, the Forest Service only responded by repeating the evaluation criteria and the method for averaging scores. GAO found that the technical evaluation was not adequately supported. The

Comptroller General continued stating that without adequate supporting documentation for the evaluation, a proper award determination was not possible. Furthermore, the contracting officer debriefing letter stated plainly that price was the basis for the agency's award decision. The RFP stated that price was last in importance and only the deciding factor if two proposals were found to be technically equal. GAO held that the record did not contain sufficient contemporaneous documentation, information, or analysis to make a decision of technical equality. GAO stated that the FAR 15.612(d)(2) (pre-rewrite) required that the documentation supporting selection decisions show the relative differences among proposals; their strengths, weaknesses, and risks; and the basis for award decisions. GAO held that the Forest Service did not adhere to the regulation and sustained the protest. The Comptroller General recommended discussions (if deemed necessary by the agency), revised BAFOs, and reevaluation. [Ref. 18]

## **E. ANALYSIS AND CONCLUSION**

The purpose of this analysis is to give the contracting officer an indication of the common pitfalls when evaluating technical merit in best value contracts.

### **1. Craft An Accurate Solicitation That Reflects the True Agency Requirement**

A best value source selection can be undermined early in the contracting process by way of a sloppily crafted solicitation. *HG* is a prime example where the true desires of an agency are not reflected in the RFP. The Forest Service stated during the protest that a

conceptual drawing of the supervisor's office met the minimum needs of the agency. Contrary to the drawing, the solicitation stated in writing that the computer room must be away from microwave and radio transmitting equipment. These contradictory requirements resulted in the agency essentially ignoring their written (overriding) requirement when making their award decision. The Comptroller General analysis and decision were obvious in this case. GAO held that the agency and awardee did not follow the solicitation. This holding stems from a previous protest decision (*Southwest Marine, Inc., American Systems Engineering Corporation; B-265865.3, B-265865.4; 23 January 1996*) where GAO asserted that the evaluation of proposals must be reasonable and bear a rational relationship to the announced criteria upon which competing offers are to be selected. [Ref. 20] The implication for the contracting officer is that great care must be taken to ensure the solicitation is well written and reflects the actual customer requirement. Poorly crafted solicitations are susceptible to protest and sustainment.

## **2. Evaluate Proposals in Accordance with the Solicitation**

The inability or unwillingness to follow the evaluation criteria in the solicitation is a prevalent miscue by Federal agencies. *TSI* documents an improper technical evaluation because a Federal agency chose not to follow the solicitation. Technology Services protested the award of a Hawaiian grounds maintenance contract in which the awardee was not held to the requirements of the RFP by the agency. The RFP required a work scheduling system for which the awardee issued only a promise to develop. The agency

(Air Force) accepted the promise and changed the awardee's score from the lowest possible (*Unacceptable*) to the highest attainable (*Exceptional*) rating. However, the good will and trust of the Air Force were not enough to convince the Comptroller General. The protester successfully argued that the awardee simply had not met the requirements of the RFP. GAO agreed. Rather than the typical recommendation of reevaluation, GAO held that the awardee's proposal was unacceptable and recommended termination and immediate award to the protester. This is despite the fact that the protester's proposed price was nearly \$2 million greater than the proposed price of the awardee. This holding stemmed from a previous protest decision (*Tidewater Homes Reality, Inc., B-274689, 26 December 1996*) where the Comptroller General held that an agency evaluation may not lack a reasonable basis or conflict with the stated evaluation criteria for award. [Ref. 22] The implication for contracting officers is that they must adhere to the evaluation criteria set forth in the solicitation when measuring technical merit. They must also thoroughly research solicitations to ensure they are free from contradictions and ambiguities. The failure to do so can result in unfair and unreasonable contract award or perhaps the purchase of an undesirable product or service by an agency.

### **3. Apply Supporting Narratives to Evaluation Records**

The requirement to attach narratives to the previously required score sheets and rankings is a product of the FAR Part 15 rewrite. However, GAO stressed the need for supporting documentation in three pre-rewrite protests.



*MECSA* is a protest that challenged a Federal agency award of a contract for the cleaning and painting of four miter gates in the Panama Canal. The agency's technical evaluation was undermined by the lack of contemporaneous supporting documentation. The agency had no justification in the evaluation record for overriding the protester's lower price and awarding to Formal Management Systems (FMS). In addition, the lack of supporting statements called into question whether the agency actually accounted for a special certification (QP-2) held by one of the protester's subcontractors. The agency maintained that it had given the subcontractor certification proper consideration. They may have, but the record did not support their assertion. As a result, GAO found that the protester had been prejudiced and sustained the protest.

*Jones* is a protest that reaffirms the crippling need for narrative in best value source selection. J. A. Jones protested the Army Corps of Engineers award of a contract for base repair and construction. The agency had only score sheets with bullet statements to support their evaluation. When their evaluation was found to be unreasonable and inaccurate, they claimed that the bullets were only impressions and not the full explanation as to why they selected Intersteel Inc. as the awardee. GAO held that if the bullets did not represent their rationale for selecting Intersteel, then their level of documentation decreased from little to none. The Army had committed the double error of improperly evaluating the proposals, and providing little or no documentation to justify their selection. GAO termed the amount of supporting documentation as a "dearth

of evaluation narratives.” The Corps of Engineers left GAO with little choice but to sustain the protest and recommend reevaluation.

*JW* is a third protest where lack of supporting documentation resulted in sustainment. The agency in this case clearly did not meet the FAR Part 15 pre-rewrite standard requiring strengths, weaknesses, risks, and basis for award to be included in the evaluation record. The agency (Forest Service) appeared to have improperly evaluated both the protester and awardee in the *Quality of Firms* factor. The protester had two complete and one in progress environmental impact statements while the awardee had none. Still, the awardee received a higher score in this heavily weighted factor. To make matters worse, the only supporting documentation consisted of a one paragraph per offeror narrative that in no way explained the scoring of the factor in question or the specific reasons for award selection. GAO sustained the protest.

*MECSA*, *Jones*, and *JW* demonstrate that the nature of tradeoff is not always clear and sometimes tenuous. The use of narrative comments provides the agency with an opportunity to explain fully their reasons for scoring, ranking, and source selection. The requirement for narrative comments (in addition to strengths, weaknesses, risks, and basis for award) was not in force when these contracts were awarded, yet GAO appeared compelled to send the message that narratives are important. The implication for contracting officers is that they must now make liberal use of narrative because the FAR Part 15 rewrite mandates it. More importantly, it allows a Federal agency to announce its

methods, motives, and reasons for tradeoff and source selection. The key fact is that contracting officers will be well served if they supply narratives with best value awards that include the agency's very thought processes in arriving at a selection decision. Failure to convey the rationale for tradeoff and source selection adequately could be perceived by GAO as unreasonable technical evaluation and source selection.

#### **4. Hold Meaningful Discussions Regarding Technical Evaluation When Required**

*IDS* is a protest that could have been avoided through the use of meaningful discussions. Discussions both before and after the FAR Part 15 rewrite involve essential information for determining the acceptability of a proposal or provide the offeror an opportunity to revise the proposal. The protester maintained that its typographical error in delivery schedule (30-45 days instead of the required 15) could have been rectified through discussions. The RFP stated discussions would not be held, and the agency believed all dialog up to that point had been clarifications. GAO held that the clarifications were actually discussions and sustained the protests. This decision was based in the FAR 15.601 (pre-rewrite) statement that defines discussions as exchanges with offerors that involve key information for determining the acceptability of a proposal. In addition, all the clarifications qualified as discussions because BAFOs were issued and accepted as a result, so the offerors were provided an opportunity to modify their proposals. The presence of discussions then meant that they had to be meaningful. GAO

held that the discussions with the protester were not meaningful because they did not address aspects of an offeror's proposal that must be corrected for the offeror to have a reasonable chance to obtain award. The agency failed to address the delivery schedule; therefore, the discussions were not meaningful. The implication for contracting officers is that all exchanges with offerors must be scrutinized and identified (e.g. discussions, clarifications). If discussions are held, they must be meaningful and conducted with all offerors in the competitive range. The Part 15 rewrite has opened the door for increased dialog through communications during competitive range determination and for adverse past performance references. This forces contracting officers to be even more aware of the consequences of their exchanges with offerors.

#### **5. Screen all Offeror Documents for Relevant Technical Information**

*Cygnus* is a protest that should never have happened. Cygnus Corporation protested the award of a contract operation and management of the National Adoption Information Clearinghouse by the Department of Health and Human Services. Here, the agency apparently overlooked or forgot to include information (potential contract problems and solutions) from the protester's BAFO in the technical scoring. The record contained no indication that the information had been received, evaluated, or included on the scoring sheets. GAO found the technical evaluation unreasonable and sustained the protest. The lesson for contracting officers is simple. Carefully review all documents

from offerors for pertinent information. Failure to do so could result in an embarrassing protest for which a Federal agency has no defense.

Contracting officers can learn a great deal from this chapter. First, crafting an accurate and clear solicitation is vital. Second, following the solicitation is critically important. Third, narratives in conjunction with other supporting documentation can explain an agency's rationale for technical tradeoff and best value source selection. Fourth, meaningful discussions about a technical evaluation may be necessary to allow an offeror to correct a proposal and have a reasonable chance to obtain award. Finally, all offeror correspondence must be carefully reviewed for relevant technical information that could affect the outcome of the source selection decision.



## VI. COST/PRICE

### A. INTRODUCTION

Cost or price is one of the most important tradeoff elements regarding best value. The reason is simple. Cost/Price must be evaluated in all proposal evaluations as a matter of regulation. Cost/Price is especially important in best value contracting because it is the single element against which all other elements (past performance, technical merit, etc.) are traded to obtain best value. The six sustained protests in which improper evaluation of price or cost was a sustaining argument are: *The Arora Group, Inc.*, *Barents Group, L.L.C.*; *Boeing Sikorsky Aircraft Support*; *Geo-Centers, Inc.*; *Sylvest Management Systems Corporation*; and *Tri-State Government Services, Inc.* These protests are divided into three categories:

1. Agency failure to evaluate the total proposal cost.
2. Improper agency evaluation of cost realism and/or price realism.
3. Agency failure to follow the solicitation.

Three of the protests were also sustained for improper agency discussions regarding the evaluation of price or cost. This chapter discusses the affect of the FAR Part 15 rewrite on cost or price evaluation, describes the six sustained protests, and provides analysis about Federal agency miscues when evaluating cost or price.

## **B. COST/PRICE AND FAR PART 15**

The Part 15 rewrite does not make any significant changes regarding price or cost. As previously stated, cost/price is required to be evaluated in every source selection. Cost/price is often analyzed to ensure a fair and reasonable price for the Government. Competition normally establishes price reasonableness. With fixed-price contracts, comparison of the proposed prices usually satisfies the requirement for price analyses. Cost-reimbursement proposal evaluations must include cost realism analyses to determine what the Government should expect to pay for proposed goods or services. [Ref. 1: 15.304, 15.305] The key behind the rewrite is the increased emphasis on best value contracting. The result is a different and sometimes more difficult handling of price or cost in proposal evaluation. Before the widespread use of best value contracting, most contracts were awarded by virtue of being either lowest price-technically acceptable or highest technically rated. Best value pushes the contracting officer within this spectrum and cost or price must always be a tradeoff element. The contracting officer must exercise good judgment in trading off non-cost factors (technical merit, past performance, labor qualifications, etc.) against price or cost. Increased best value awards mean more complexity in the contracting officer's proposal evaluations. Cost/price is a key issue for the contracting officer to manage on every proposal evaluation.



**C. AGENCY FAILURE TO EVALUATE THE TOTAL PROPOSED COST OR PRICE**

**1. Boeing Sikorsky Aircraft Support**

*Boeing Sikorsky Aircraft Support; B-277263.2, B-27263.3; Comptroller General of the United States; 29 September 1997, (Boeing)* is a protest in which agency failure to evaluate the total proposed cost, improper agency evaluation of labor cost, and agency failure to hold meaningful discussions resulted in sustainment. Boeing protested the U.S. Special Operations Command (SOCOM) award of a cost-plus-award-fee contract for the operations and maintenance of the Special Operations Forces Support Activity (SOFSA) at depots in Richmond and Lexington, Kentucky. SOFSA consists of Government-owned, contractor-operated facilities that provide logistics support for the Special Operations Forces (SOF) including equipment repair, modification, and sustainment; prototype and low volume manufacturing; maintenance management; and life cycle support. The contract was for one base year with four, one-year options. SOCOM determined Raytheon E-Systems (Raytheon) to be the offeror whose proposal represented the best value to the Government.

The RFP was written to allow offerors as much latitude as possible to propose innovative ways of doing business and to encourage creativity in problem solving. Offerors were required to complete seven sample tasks. Six of the tasks were outlined in the RFP, and the seventh was to be performed within two weeks of the closing date to

simulate the rapid reaction environment of SOFSA. The proposals were evaluated in the following areas (descending order of importance): (1) technical, (2) management, (3) performance risk, and (4) cost. The technical area was comprised of the seven required tasks where management and performance risk each had various sub-factors for evaluation. Cost evaluation encompassed five sub-factors: (1) cost estimating and control, (2) quality control (3) security management, (4) schedule planning and control, and (5) management effectiveness. The cost evaluation scheme used a risk scale (low, moderate, high) to score the various sub-factors. This cost evaluation structure was designed to measure each offeror's ability to estimate accurately the cost of completing logistics support tasks, as well as each offeror's overall proposal cost. Five offers were received by SOCOM. SOCOM found Raytheon to be equal to Boeing in technical merit and performance risk and superior to Boeing in the management and cost factors. SOCOM awarded the contract to Raytheon. Boeing Sikorsky protested.

The protester raised two challenges to SOCOM's cost evaluation. First, the protester argued that the agency failed to take into account the most probable cost of the proposals. In other words, SOCOM evaluated cost only from a risk perspective—not total cost difference between competing proposals. The agency countered by stating that it was not required to consider the most probable costs because the solicitation made no such provision. GAO showed that the RFP stated that the total dollar figure would be used by the Government as an indicator of total cost for the expected term of the contract.

Even if the solicitation supported the agency, GAO found SOCOM's assertion that consideration of total cost was not a requirement to be legally incorrect. GAO stated that CICA (1984) mandated inclusion of cost or price as a significant factor in the evaluation of proposals. GAO determined that SOCOM failed to give significant consideration to cost and found their evaluation to be unreasonable.

The protester's second argument maintained that SOCOM erroneously increased its labor costs. The protester had failed to consolidate all labor costs into one figure in its proposal in accordance with the RFP. Even though the summation of labor cost was not in the proposal, there were no missing labor hours in the offer. As a result, the agency erroneously adjusted Boeing's cost upward to compensate for what appeared to be missing labor hours. GAO found that the accuracy of the labor hour assessment was not the critical issue. The key issue regarding the labor hours was that SOCOM failed to conduct meaningful discussions with Boeing regarding a perceived significant error in their proposal. Boeing should have been placed on notice regarding this perceived weakness in their proposal. The resultant cost adjustment was significant, for Boeing had been assigned a *high* risk rating in overhead and labor cost evaluations. Moreover, the elimination of the cost adjustment through discussions would have resulted in Boeing having a lower cost proposal than Raytheon.

The lack of discussions was the linchpin in this protest. The failure to evaluate the total cost would not normally have been crucial in this particular award because

Raytheon had a proposal with an overall advantage in non-cost factors as well as cost factors. However, with the agency error regarding the assessment and subsequent upward adjustment to labor hours, Boeing may well have been denied cost advantage due to the evaluation. A Boeing cost advantage coupled with a Raytheon non-cost advantage would have required the agency to conduct a tradeoff analysis to see which proposal represented the best value to the Government. In this case, no such tradeoff analysis was executed. GAO found that Boeing had been prejudiced by the combination of agency failure to compare total costs, agency error in evaluating labor cost, and agency failure to hold meaningful discussions. The Comptroller General sustained the protest. GAO recommended that SOCOM reopen negotiations with all offerors, request revised proposals, and reevaluate the proposals for a best value award. [Ref. 24]

## **2. Sylvest Management Systems Corporation**

*Sylvest Management Systems Corporation; B-275935, B-275935.2; Comptroller General of the United States; 21 April 1997, (Sylvest)* is a protest where agency failure to evaluate the total price (all costs) resulted in sustainment. Sylvest protested the Tennessee Valley Authority (TVA) award of a contract for the purchase of computer hardware and maintenance support services. TVA determined BTG Inc. (BTG) to be the firm whose proposal represented the greatest value to the Government.

The RFP described three schedules of required services. Schedule I included the purchase of computer maintenance services. Schedule II and III were for the purchase of

new hardware plus various hardware and software upgrades to TVA's current computer system. The solicitation stated that multiple contracts could be issued to satisfy the requirements contained within the three schedules. This protest only addressed the TVA's award under Schedule III for new hardware. Under Schedule III, each offeror was required to submit offers for nine servers of three sizes (small, medium, and large) from three separate manufacturers. The offerors were required to test and certify that the hardware met both industry standards and TVA-specific benchmarks. The RFP stated that the contract would be awarded to the offeror who received the highest cumulative score for both technical and price evaluation factors. TVA evaluated all proposals, held discussions, received two rounds of BAFOs, and awarded a contract under Schedule III to BTG. Sylvest Management Systems protested.

The protester argued that the agency erroneously evaluated BTG's price proposal. The protester asserted that the BTG did not propose the same hardware configuration that they used to test to TVA benchmark standards successfully. The protester also stated that a significant amount of memory had to be added to BTG's basic (proposed) hardware configuration to meet TVA benchmarks successfully. The protester pointed out that BTG had listed the extra hard disk memory as an option in the proposal, and as a result, the agency did not consider all costs (cost of required extra memory) when determining best value.

TVA countered stating that the certification in BTG's BAFO was a satisfactory indication that BTG was offering the optional additional memory as part of its basic package. GAO described TVA's position as untenable. The Comptroller General found (without yet evaluating the certification) that it was clear from BTG's BAFO that the extended price did not include the extra hard disk memory required to satisfy TVA benchmarks. GAO further held that the certification did not incorporate the required additional memory in the offered system at no additional cost. BTG's certification stated only that their proposal had been updated to reflect the benchmarked configuration. The awardee's certification did not state that all items included in the required configurations were included in the systems prices as required by the solicitation. The Comptroller General also found that BTG's exclusion of the substantial cost required to upgrade the hard disk resulted in BTG having a lower cost than Sylvest. GAO found that Sylvest had been prejudiced and recommended reevaluation of the BAFOs submitted in response to Schedule III. [Ref. 26]

**D. IMPROPER AGENCY EVALUATION OF COST REALISM AND/OR PRICE REALISM**

**1. Barents Group L.L.C**

*Barents Group, L.L.C.; B-276082, B276082.2; Comptroller General of the United States; 9 May 1997, (Barents) is a protest where improper agency cost realism analysis failed to detect awardee conditions placed on RFP mandated pricing multipliers. The*

result was sustainment. Barents protested the award of an Agency for International Development (AID) contract for technical expertise in: (1) economic and institutional analysis and (2) private sector development issues. The solicitation envisioned between four and six indefinite quantity contracts. Each of these contracts was to be for three base-years and two option years with one contract set aside under the Small Business Administration's 8(a) program. AID found Chemonics International, Inc. (Chemonics); Booz-Allen & Hamilton, Inc. (Booz-Allen); Abt Associates, Inc. (Abt); Carana Corporation (Carana); and Deloitte Touche Tohmatsu (Deloitte) to be the offerors who submitted proposals representing the greatest value to the Government.

The RFP outlined the award of contracts in two functional areas; however, protests were issued regarding only line item 0001—privatization issues. The solicitation stated that awards would be made to the responsible offerors submitting acceptable, reasonably priced proposals that offered best value to the Government. Each proposal was to be assigned a score for technical and cost. Technical was weighted 60 percent and cost 40 percent. Technical factors included the following (25 points each): (1) personnel qualifications and experience, (2) quality and responsiveness, (3) demonstrated corporate experience, and (4) past performance.

Under cost, the solicitation called for offerors to propose a maximum fixed daily salary for seven labor categories covering the base and option periods. In addition, the offerors were supposed to issue two fixed multipliers, one for U.S. expatriate staff and the

other for non-U.S. personnel. The multipliers were to contain all payroll costs, indirect costs, home/corporate office secretarial/administrative support, computer rental, report preparation costs, and profit or fee. The solicitation stated that the agency would calculate an average burdened daily rate using the multipliers and the maximum fixed daily salaries.

AID received 17 offers. Agency officials then scored the offers under the four technical criteria, applied the 60-40 technical to cost factor, and ranked the offerors as follows: Chemonics, Deloitte, Carana, Booz-Allen, Abt, and Barents. Barents was the only offeror in the top six that did not receive a contract award. The agency said the awards were not based solely on scores. A best value analysis was performed. The agency stated that it initially decided to make awards to Chemonics, Deloitte, and Carana because they were in the top six technically and in the top four (lowest) in price. After the first three firms were ranked, the contracting officer ranked Booz-Allen fourth overall with Abt finishing fifth—ahead of Barents. The agency noted that while Barents technical score exceeded Booz-Allen's and Abt's, the lower prices of Booz-Allen and Abt offset any technical advantage enjoyed by the protester. The agency awarded contracts to the five firms ranked higher than Barents plus one SBA 8(a) company. Barents protested.

Among other allegations, Barents argued that AID failed to perform a cost realism analysis in accordance with the solicitation. Barents maintained that AID was required to evaluate whether the costs proposed by each offeror were consistent with the firm's



technical proposal. The RFP also stated that costs could have been adjusted as a result of a cost realism analysis to evaluate the proposals fairly. Specifically, Barents asserted that Booz-Allen placed a contingency in their proposal, which should have been found unacceptable by the agency. Booz-Allen's proposal stated: "Some of the labor hours included in this cost estimate are bid at off-site rates, substantially lower than rates normally applicable to services performed at our facility. These rates are based upon the provision of the following property/facilities by the client or one of our subcontractors. (a) Office facilities (b) Communications, i.e. local and long distance telephone service (c) Copying facilities (d) Computer facilities, as required (e) General office supplies (f) parking facilities. The costs proposed are specifically conditioned upon the availability of the items set forth above." [Ref. 23] Barents argued that this provision made the fixed daily salaries and multipliers contingent on the availability of the listed items. Therefore, Booz-Allen failed to comply with the RFP because the listed items were supposed to be factored *into* the salaries and multipliers. Barents also maintained that each of Booz-Allen's proposed multipliers for personnel included the statement: "Assumes bilateral agreements between [AID] and participating government cover any cost incurred in respect to tax, duties, bonding, and any social welfare costs." [Ref. 23] Barents stated that the solicitation did not outline such agreements. The protester argued that since Booz-Allen's daily salaries were based on the assumption that costs would be paid by AID or the participating Government, Booz-Allen's proposal was unacceptable.

AID countered by stating only that Booz-Allen's proposal was in conformity with the solicitation. However, the agency had no explanation for the awardee's statement that the proposed costs were specifically conditioned upon the availability of the listed items that were supposed to already be included in the fixed daily salaries and multipliers. AID also took the position that none of the alleged objectionable language from Booz-Allen's proposal was included in the final contract, so it had no impact on the award. GAO found the agency evaluation unreasonable and stated that it was clear that Booz-Allen's proposal did not comply with the solicitation requirement for fixed multipliers. In conjunction, AID's cost realism analysis of the awardee's proposal was inadequate. The Comptroller General also addressed AID's assertion that the contract was devoid of objectionable language; thus, the proposal flaws were of no matter. GAO stated that an awarded contract does not have to incorporate all aspects of a proposal. However, the contract may not vary materially from the offer. GAO found that the contract was materially different. In addition, GAO held that the conditions placed in the proposal by Booz-Allen removed the fixed nature (cap) of the prices. The awardee circumvented the cap in this case, and the Government was no longer shielded from cost growth. In such a situation, GAO held that a proper cost realism analysis was required. GAO found that a proper cost realism analysis was not held because it did not include an evaluation of the extent to which Booz-Allen's proposed costs--represented what the contract should cost. GAO recommended that AID clarify the RFP, request revised BAFOs, and reevaluate.

## **2. Geo-Centers, Inc.**

*Geo-Centers, Inc., B-276033, Comptroller General of the United States, 5 May 1997, (Geo)* is a protest in which agency failure to properly conduct price and cost realism analyses on sample task costs resulted in sustainment. Geo protested the Army's award of a cost-plus-fixed-fee, task order requirements contract for scientific and technical support services for the Health Effects Research Program (HERP). HERP was part of the Army's Center for Health Promotion and Preventative Medicine at Aberdeen Proving Ground, Maryland. The contract was for one base year with two option years. The Army determined Dynamic Corporation (Dynamic) to be the offeror whose proposal represented the best value to the Government.

The RFP outlined five evaluation factors: technical merit, management merit, performance risk, cost, and subcontracting plan. The technical merit and management merit were to be combined and scored numerically on a 1,000 point scale. Performance risk was to be evaluated on a narrative basis. The subcontracting plan was to be graded on a go/no go (pass or fail) basis. The solicitation stated that technical merit and management merit were significantly more important than cost, and cost was slightly more important than performance risk. Cost was to assume greater importance in the event of two or more proposals being evaluated as equal in the technical merit and management merit criteria. The RFP contained three sample tasks for which each offeror was to submit technical responses with sample task cost proposals. These sample task

cost proposals were in addition to the total offeror cost proposal required by the solicitation.

The sample task cost proposals were to be evaluated for price reasonableness and cost realism, and the solicitation defined both terms. Cost realism was defined as “whether or not the offeror has proposed sufficient resources to successfully perform the contract and sample task work.” Price realism was outlined as “a matter of the competitiveness of the offeror’s proposal, considering, the price and the merit factors area.” [Ref. 25] Geo received initial proposal, post discussion, and BAFO scores of 930, 998, and 1000 respectively (1000 point scale). Dynamic received scores of 680, 775, and 1000. Both proposals were found to be technically equal, so the Army awarded the contract to the offeror with the lowest overall proposed cost—Dynamic. Geo protested.

Geo argued that the agency failed to conduct cost realism or price realism evaluations on the sample task costs in Dynamic’s BAFO. The protester’s argument pointed to the fact that Dynamic increased labor hours and costs for the three sample tasks, yet they lowered their overall proposal costs by 25 percent. Geo argued that these major cost shifts should have drawn reevaluations of price and cost reasonableness for the sample tasks from the Army. The agency maintained that the pricing in the sample task was not intended as a tool for establishing a basis for price reasonableness. The RFP supported the agency’s assertion stating that the sample tasks were not used to determine

the total contract price; rather, they were merely a gauge for contractor understanding of the effort required for contract completion.

However, GAO stated that by using a task order requirements contract, the agency acknowledged that it was not able to determine the exact quantity of services and materials needed during the performance period. Therefore, the cost to the Government would have varied based on the actual task orders issued, and most likely, with a contractor's efficiency in performing the issued tasks. The offerors' overall proposal costs were not dependable. GAO stated that the sample task cost proposals were a significant indicator of future cost to the Government. In addition, the solicitation advised that sample task costs would be evaluated for both cost realism and price reasonableness, and the agency was bound to use the evaluation tools identified in the RFP. GAO determined that the Army failed to conduct price and cost realism evaluations on Dynamic's BAFO. The failure to analyze the cost realism of the proposed sample tasks left the agency open to the possibility that Dynamic did not accurately account for all of the costs that will be incurred during the performance. GAO further determined that the Army failed to conduct any price realism analyses of sample task costs (in proposals or BAFOs) despite the requirement in the solicitation. GAO found Geo had been prejudiced because the Comptroller General could not conclude that the protester would not have had a substantial chance of award had the agency properly analyzed the

sample task costs. As a result, GAO sustained the protest and recommended reevaluation. [Ref. 25]

### **3. Arora Group, Inc.**

*Matter of Arora Group, Inc., B-277674, Comptroller General of the United States, 10 November 1997, (Arora)* is a protest in which the Federal agency unreasonably determined that the protester's proposal lacked price realism. Arora Group protested the U.S. Navy's award of a fixed-price contract for the services of ten pharmacists for the National Naval Medical Center in Bethesda, Maryland. The contract was to be a small business set aside under the SBA's 8(a) program. The solicitation sought the services of ten full-time and five optional pharmacists for a base period of four option periods spanning a maximum of five years. The Navy determined Saratoga Medical Center, Inc. (SMC) to be the best value offeror.

The RFP stated that the best value award would be made to the offeror whose proposal conformed to the specified minimum healthcare worker qualifications and offered the Government with the best combination of past performance and price. Offerors had to provide proof that they would provide at least ten individual healthcare workers. Past performance was outlined as significantly more important than price. In the event two or more offerors had equal past performance, price would be the deciding factor. The solicitation also stated that price realism analyses would be conducted to

preclude unrealistically low cost estimates. These analyses were to be conducted within the context of the offerors' past performance.

The agency received eight proposals. Both the protester and awardee earned past performance grades of *Good*. With respect to price realism, the Federal Acquisition Circular (FAC 90-23) recommended an annual wage escalation rate of three percent. The Navy had indicated that provisions for wage escalation should be included in each offeror's proposal to guard against labor turnover and wage increase. The protester failed to propose wage escalation during the option periods covered in the RFP. The Navy determined that the protester's failure to provide for any salary escalation presented a price realism issue because it created risk that the offeror might not be able to maintain a pool of qualified personnel or recruit suitable replacements. The protester was advised of this perceived shortcoming in its proposal through discussions but did not submit wage escalation data in its revised proposal. The agency determined SMC to be the best value offeror and awarded them the contract. Arora Group protested.

The protester argued that the Navy's price realism analysis was not in accordance with the RFP and plainly erroneous. The protester asserted that the agency incorrectly conducted price realism analysis because they failed to consider the fact that Arora Group addressed the recruitment/retention issue through long-term employment agreements. In addition, the protester had planned for recruitment costs in its General and Administrative (G&A) budget in the event of personnel turnover. The Navy countered that the protester's

plan did not provide convincing evidence that they would be able to retain the healthcare workers through the five-year span of the contract without wage escalation. The agency also stated that the protester's G&A budget for recruitment was vague.

GAO held that the agency's decision to reject Arora's proposal because its failure to propose wage escalation created an unacceptable price realism risk was neither reasonable nor consistent with the evaluation criteria. The Comptroller General stated that the agency failed to adequately evaluate the information presented by the protester. With respect to the employment contracts, the Navy had requested copies of the labor agreements during discussions. The protester failed to provide these agreements; therefore, the Navy essentially ignored the possible impact of this approach. GAO found this action to be unreasonable. GAO stated that while copies of labor agreements may have provided reassurance to the Navy, Arora's failure to provide the copies did not mean the agency could completely discount the protester's efforts in this regard. Furthermore, the agency improperly evaluated the protester's G&A budget for recruitment and understated its value by 90 percent. GAO held that the combination of the unreasonable discounting of the labor agreements and the erroneous evaluation of the G&A budget prejudiced the protester. The Comptroller General sustained the protest. [Ref. 32]



## **E. AGENCY FAILURE TO FOLLOW THE SOLICITATION**

### **1. Arora Group, Inc.**

*Arora* also demonstrated agency failure to follow the solicitation. The RFP stated that the price realism analyses were to be conducted within the context of the offerors' past performance. Both the protester and awardee received past performance scores of *Good*. The protester had offered a lower price than the awardee. However, the agency ignored the evaluation criteria and rejected *Arora Group's* proposal due to concern about price realism (wage escalation) risk. With respect to the protester's proposal, GAO held that the Navy failed to conduct price realism analysis and tradeoff as outlined in the RFP. The agency had improperly made price realism a separate and determinative evaluation factor. GAO sustained the protest and recommended reconsideration of the evaluation criteria, BAFOs, and reevaluation. [Ref. 32]

### **2. Tri-State Government Services, Inc.**

*Tri-State Government Services, Inc., B-277315.2, Comptroller General of the United States, 15 October 1997, (Tri-State)* is a protest in which agency failure to hold the awardee to the terms of the RFP combined with improper post-BAFO discussions resulted in sustainment. *Tri-State* protested the Defense Logistics Agency (DLA) award of a fixed firm price contract for the removal, transportation, and disposal of hazardous waste items located at various Defense Reutilization and Marketing Sites (DRMS). The solicitation anticipated an 18-month base period with two option years. DLA found

Associated Environmental Services, Inc. (AES) to be the offeror whose proposal represented the best value to the Government.

The RFP required separate technical, price, and past performance proposals and warned offerors that proposals, which did not include all required information in the prescribed format, could be excluded. The solicitation outlined price, past performance, socioeconomic plan, and Mentoring Business Agreement (MBA) participation as evaluation factors. Past performance and price were outlined as equal in importance; furthermore, they were also stated to be significantly more important than the value of socioeconomic plan and MBA combined. The RFP divided the work to be performed in to 94 contract line items (CLIN) for different waste substances. Each proposal was to provide a single unit price for each CLIN in a space provided in the solicitation price schedule. The single unit prices were to be multiplied by the agency's estimated quantity (of hazardous waste) to arrive at an extended price for each CLIN, and then all CLIN extended prices would be summed to reveal a total price. Eleven offerors submitted proposals with only five surviving the competitive range determination. Four of the five proposals (including AES and Tri-State) were graded as *good* under both past performance and a best value composite rating. Price became the determining factor. AES ranked first in price with a total of \$ 3.29 million. Tri-state finished second in price with an offer totaling \$ 3.44 million. AES was awarded the contract and Tri-state protested.

Tri-state argued that AES improperly modified the agency's price schedule and should not have been considered. Instead of submitting single unit prices for each CLIN, AES split DLA's estimated quantities listed on the price schedule and submitted one price for a number that it described as *first* quantities ordered and a different price for what it designated as *next* quantities ordered. In each of the split CLINs, the prices were higher for the *first* quantities ordered and lower for the *next* quantities. The protester contended that the modified pricing scheme gave AES an unfair advantage because such a pricing method was not available to all offerors. Tri-state also asserted that DLA conducted improper post-BAFO discussions with AES. Tri-state maintained that the agency re-opened discussion with the awardee to negotiate prices for any quantities ordered beyond the Government estimates shown in the RFP.

Regarding the pricing scheme, the agency countered claiming that the RFP did not prohibit AES's pricing strategy. DLA considered the awardee's pricing strategy as only a minor irregularity and consistent with the RFP. GAO held that the agency improperly accepted the awardee's offer because it did not conform to the material terms and conditions of the solicitation. GAO stated that an irregularity in an offer that benefits the offeror must be extended to all firms submitting proposals. GAO continued by stating that if the beneficial irregularity is not extended to all offerors, the proposal containing such an irregularity may not be accepted. In determining prejudice, GAO found that if

Tri-State had been allowed to use AES's pricing method, the protester would have had a lower overall price than AES by \$ 130,000.

With respect to Tri-State's assertion of improper discussions with the awardee, the agency asserted that the contracting officer believed that it was reasonably clear from their proposal that the prices AES had quoted for *next* quantities would apply to future quantities beyond the Government estimates. DLI claimed that they only conducted *clarifications* with AES to clear the ambiguity as to the price of these follow-on quantities. GAO held that the exchanges were actually *discussions* for two reasons. First, the Comptroller General held that it was not reasonably clear that the next quantity prices would apply beyond the Government estimates. Second, the information exchanged was necessary to determine the acceptability of AES's proposal. GAO held that Tri-State was prejudiced because of the improper pricing and discussions. GAO sustained the protest with a recommendation to terminate the AES contract and award to Tri-State. [Ref. 27]

## **F. ANALYSIS AND CONCLUSION**

The purpose of this analysis is to provide contracting officers with insight as to possible agency miscues when evaluating cost or price.

### **1. Evaluate the Total Price or Cost**

Failure to evaluate the total price or cost is an agency error that must not be committed. However, *Boeing* showed that agency efforts to evaluate cost risk cannot be

executed to the exclusion of a total cost comparison between offerors. The agency (SOCOM) seemed to be unfamiliar with this requirement even though their RFP clearly mandated a total cost comparison. GAO cited a general rule of law originating with CICA (1984) that required inclusion of cost or price as a significant factor in the evaluation of proposals. The implication for contracting officers is clear. Failure to consider total cost is a very winnable protest for firms. Contracting officers cannot get so caught up with slick cost analysis tools that they make tradeoffs without consideration of a basic total cost/price comparison. Boeing also demonstrated an erroneous agency adjustment of labor cost coupled with a failure to inform the offeror through meaningful discussions can contribute to a sustainment. Although the protester did not provide a summation of its labor cost figures as was required by the RFP, SOCOM clearly erred by (1) failing to discuss the apparent mistake with the offeror and (2) erroneously adjusting the labor cost upward. GAO stated the agency's error regarding the labor cost was not nearly as critical as their failure to inform the offeror during discussions. GAO's holding on this point was founded in the FAR requirement (pre and post-Part 15 rewrite) for agencies to ensure that discussions (when held) are meaningful. [Ref. 13: 15.601] For SOCOM's discussions to be meaningful, they would have had to inform Boeing of the aspects of their proposal that had to be addressed in order for the offeror to have a reasonable chance to obtain award. SOCOM had to discuss the perceived mistake in

labor cost. The implication for contracting officers is that they must ensure discussions convey any proposal shortcomings for the discussions to be meaningful. [Ref. 24]

*Sylvest*, like *Boeing* shows that an action that indirectly undermines the total cost or price comparison can result in a sustained protest. The agency (TVA) failed to compare adequately proposal prices by awarding the contract to an offeror who had made a necessary hard disk modification (memory increase) an option in their proposal. GAO held that the agency did not consider the *optional* price increase when they compared proposal prices resulting in a lower proposed price by the awardee. In other words, TVA did not compare the awardee's total price (hard disk plus increased memory) to the protester's total price. GAO's holding looked to the FAR requirement for acceptable proposals to be responsive. [Ref. 13: 9.104] The awardee's proposal was not responsive. The implication for contracting officers is that they must be wary of proposals that vary from solicitations. If the variance is material, the proposal is unacceptable. [Ref. 26]

## **2. Thoroughly Conduct Cost/Price Realism Analyses When Required**

Failure to conduct cost/price realism analyses undermines price evaluation. *Barents* demonstrates that improper cost realism can result in sustainment. The solicitation required that all costs be included into fixed multipliers so that the agency could evaluate an averaged burdened daily rate in pursuit of best value. The agency's (AID) problem stemmed from an awardee that placed a contingency on their price multipliers. The multiplier rate was contingent on the availability of certain property and

facilities. The RFP stated that multipliers could have been adjusted through a cost realism analysis to evaluate the proposals fairly. A proper cost realism analysis would have uncovered the discrepancy (contingency) in the awardee's proposal. GAO held that the cost realism analysis was inadequate. GAO's holding was founded in the requirement that a contract may not materially vary from a proposal. The Comptroller General determined that the contract did materially vary from the offer, and the cost realism analysis did not shed light on the unacceptable contingency levied by the awardee. The implication for contracting officers is that they must make use of tools such as cost/price realism analyses. These tools guard against proposals that materially differ from solicitations which often leads to contracts that materially differ from the proposals as in this case. [Ref. 23]

*Geo* showed how the agency's failure to conduct both cost and price realism analyses resulted in a sustained protest. The awardee's BAFO increase in sample task costs, combined with a 25 percent decrease in overall proposal costs, should have drawn a cost and price reevaluation by the agency. It did not. Sample tasks and associated cost and price realism analyses were required by a solicitation for this task order requirements contract. The analyses of the sample tasks were identified by the RFP as only measures of contractor understanding. However, GAO stated that the sample task costs were the only reasonable method for cost estimation because the cost to the Government would have varied based on the issuance of actual task orders. In addition, GAO found that no

price realism analyses had been conducted on any of the offerors' proposals or BAFOs. GAO's holding arose from a previous protest (*Group Technologies Corp.*, B-240736, 19 December 1990). The Comptroller General had held that in task order contracts, the use of sample tasks permitted agencies to review the approaches and efficiencies of different contractors under simulated contract conditions which require the submission of detailed cost proposals. [Ref. 25] In *Geo*, where the solicitation advised that sample tasks would undergo cost and price realism analyses, the agency was bound to use the evaluation methods identified in the solicitation. The implication for contracting officers lies in the need for Federal agencies to use the evaluation tools indicated in their solicitations. Failure in this regard provides a strong basis for sustainment. [Ref. 25]

*Arora* demonstrates how improper and inaccurate price realism analyses can result in sustainment. The Navy failed to account for the protester's plan to counter wage escalation through long-term labor agreements. In addition, the agency erroneously assessed the protester's G&A budget for recruitment (in the event of labor turnover). GAO held that the evaluation of the protester's proposal was unreasonable and inconsistent. This holding stemmed from an inherent requirement for the Government to provide accurate cost realism analyses when such analyses are outlined in the solicitation. The implication for contracting officers is that great care must be taken to ensure accurate and reasonable price analyses. [Ref. 32]



### 3. Follow the Solicitation

As in previous chapters, a Federal agency's inability or unwillingness to follow the terms of solicitations results in sustainment. In *Arora*, the RFP stated that price realism analyses would be conducted within the context of the offerors' past performance. With respect to the protester, the Navy ignored the requirement to analyze price realism within past performance because the agency had concerns about the risk of wage escalation and labor turnover. GAO held that such concerns were valid; however, the agency was still required to adhere to the solicitation by evaluating price realism within the context of past performance. The Comptroller General bolstered this decision by stating that an agency could not arbitrarily make price realism a separate and determinative evaluation factor because the solicitation clearly stated that price reasonableness would be evaluate within the past performance factor. The implication for the contracting officer is that the solicitation must be followed regardless of the unusual aspects of an offerors proposal. Fair and consistent evaluation cannot be achieved without adherence to the solicitation. [Ref. 32]

In *Tri-State*, the awardee gained a price advantage by inappropriately splitting the CLINs and offering both *first* quantity and *next* quantity prices. GAO held that this irregularity benefited the awardee; therefore, the protester was prejudiced. GAO's ruling stemmed from another previous protest (*Multi-Spec Prods. Group Corp., B-245156.2, 11 February 1992*) which stated when an irregularity in an offer results in benefits to an

offeror, it must be extended to all offerors. None of the other offerors were extended the opportunity to make use of the awardee's pricing scheme. GAO determined that the awardee had an unfair advantage and sustained the protest. The implication for contracting officers is that the RFP simply must be followed. In addition, improper discussions were held regarding the pricing of quantities beyond Government hazardous waste estimates. GAO held that the agency's perceived clarifications were actually discussions because they involved information essential to determine the acceptability of a proposal. The rule applied by GAO was that if discussions are held with one offeror, they must be held with all offerors in the competitive range. [Ref. 13: 15.601]

Contracting officers must be cognizant of their exchanges with contractors and ensure that when discussions are held, all offerors must be included.

Contracting officer should take these valuable lessons with them when evaluating cost/price. First, ensure total price or cost is evaluated and a comparison is held between all offerors. Second, execute price and/or cost realism analyses when required. Finally, follow the solicitation. Chapter VII examines protests that were sustained due to improper agency evaluation of labor qualifications.

## **VII. LABOR QUALIFICATIONS**

### **A. INTRODUCTION**

Improper Federal agency evaluation of labor qualifications is cited as a sustaining argument in nine percent of the successful protests. Labor qualifications are often important elements in a best value tradeoff. Clearly, a special qualification brings value to an offeror's proposal as well as associated costs. These valued qualifications must be traded off, and through the contracting officer's judgment, best value is determined. The two protests that were sustained due to improper evaluation of labor qualifications are *Barents Group, L.L.C.* and *For Your Information, Inc.* This chapter thoroughly describes the two sustained protests and provides analysis and conclusions regarding agency evaluation of labor qualifications.

### **B. PROTESTS**

#### **1. Barents Group, L.L.C.**

*Barents Group, L.L.C.; B-276082, B276082.2; Comptroller General of the United States; 9 May 1997, (Barents)* was discussed in Chapter VI because improper agency evaluation of cost/price is a sustaining argument in this protest. Improper agency evaluation of labor qualifications is also a sustaining argument. Barents protested the award of an Agency for International Development (AID) contract for technical expertise in: (1) economic and institutional analysis and (2) private sector development issues. The RFP outlined the award of contracts in two functional areas; however, protests were

issued regarding only line item 0001—privatization issues. Each proposal was to be assigned a score for technical and cost. Technical was weighted 60 percent and cost 40 percent. Technical factors included the following (25 points each): (1) personnel qualifications and experience, (2) quality and responsiveness, (3) demonstrated corporate experience, and (4) past performance. AID found Chemonics International, Inc. (Chemonics); Booz-Allen & Hamilton, Inc. (Booz-Allen); Abt Associates, Inc. (Abt); Carana Corporation (Carana); and Deloitte Touche Tohmatsu (Deloitte) to be the offerors who submitted proposals representing the greatest value to the Government.

Barents argued that the proposals submitted by Chemonics and Carana did not comply with the solicitation. The RFP required the submission of three resumes for investment bankers to be assigned to the project. The protester maintained that in both of the awardees' proposals, one of the three resumes did not meet the qualification of an investment banker. Barents asserted that investment bankers, by definition, underwrite and sell new securities. The protester pointed out that Chemonics and Carana had both proposed personnel that were mere consultants and not investment bankers. The protester went so far as to cite the Dictionary of Banking (Jerry M. Rosenberg (1983)) which stated that an investment bank "serves as an underwriter for new issues of bonds or stocks and as part of a syndicate, redistributes the issues to investors." An investment banker was defined as "the middleman between the corporation issuing new securities and the public." [Ref. 23]

AID countered by arguing that the RFP did not specify the exact qualifications required for the investment bankers. Instead, each offeror was to determine the competencies necessary to complete the required work. GAO agreed that the RFP did not contain definitions of any of the various required labor categories; however, the solicitation did ask for separate sets of resumes for each of the labor categories including: corporate financial advisor, commercial banker, and investment banker. GAO held that the only reasonable interpretation of the RFP was that the resumes for the various labor categories should have represented the differences between the categories. In short, the terms of the solicitation were not met because inexperienced consultants did not qualify as investment bankers. GAO determined that the combination of the improper evaluations of price (Chapter IV) and labor qualifications did prejudice Barents. The Comptroller General recommended that AID clarify the RFP, request revised BAFOs, and reevaluate. [Ref. 23]

## **2. For Your Information, Inc.**

*For Your Information, Inc., B-278352, Comptroller General of the United States, 15 December 1997, (FYI)* is another protest where improper agency evaluation of personnel qualifications resulted in sustainment. FYI protested the U.S. Coast Guard (USCG) award of a fixed-price, indefinite delivery/indefinite quantity contract for information technology support services. The contract was restricted under the Small

Business Administration's 8(a) program. USCG found RGII Technologies, Inc. (RGII) to be the offeror representing best value to the Government.

The RFP called for a technical evaluation team (TET) to evaluate the proposals in two phases. Under Phase I, the TET would evaluate mini-proposals and past performance. Phase II would be evaluated under oral presentation/slides, personnel data forms (PDF), and cost/price. The proposals were to be evaluated under the following color/adjectival system: blue/superior, green/satisfactory, yellow/marginal, and red/unsatisfactory. Fifty-one proposals were received. Offerors receiving blue ratings in Phase I were invited to continue to Phase II. Offerors not receiving blue ratings could continue if they chose to do so. Both FYI and RGII received green ratings in Phase I and elected to continue into Phase II evaluations. Phase II was described to be more important than Phase I. The solicitation identified ten Phase II labor categories as key personnel positions. Offerors were required by the RFP to provide PDFs (containing qualifications, education, and employment history) for 50 percent of the proposed personnel in each labor category.

All BAFO's received by offerors for Phase II evaluation were determined to have overall ratings of green and were found to have reasonable and realistic prices. The factor in question in this protest was personnel requirements. Only FYI's BAFO was found satisfactory (green) under personnel requirements. RGII's BAFO was rated as yellow/marginal because PDF's (for 50 percent of the proposed personnel) were not

submitted for five of the ten labor categories. The TET recommended FYI for award to the source selection official (SSO) even though FYI's price was higher. The SSO asked for justification as to why the contract recommendation was being made on a basis other than lowest price. The TET responded stating that it doubted RGII's ability to obtain the qualified personnel because they failed to propose qualified workers even after the matter was addressed during discussions. The SSO requested information on RGII's past performance and was told it was superior. The SSO found that RGII's offer was the best value for the Government because the risk associated with the lack of qualified personnel was outweighed by: (1) past performance and (2) the fact that PDF risk was to be minimized by an RFP provision for USCG approval of all PDFs before granting access to the work site. The SSO also determined that any proposal shortcomings regarding personnel qualifications would be dealt with under applicable labor substitution clauses during contract administration. The SSO stated that the cost differential did not justify granting FYI the contract award. RGII was awarded the contract, and FYI protested.

FYI argued that the awardee's proposal should have been found unacceptable by the agency. GAO concurred pointing to the RFP that stated that the quality and quantity of all proposed personnel had to meet the minimum qualifications stated in the solicitation. GAO asserted that a proposal that fails to conform to the material terms and conditions of a solicitation must be considered unacceptable. The Comptroller General stated that there was no question that personnel qualifications were material terms of the

RFP and held that RGII's proposal did not satisfy the personnel qualification requirements. GAO also stated that qualification problems could not be handled during contract administration because the RFP required the contractor to assign the personnel named in the PDFs to the contract. Therefore, the only agency opportunity to approve or disapprove proposed individuals was during the evaluation—regardless of any clauses attached to the contract by the contracting officer. Thus, the agency's post-award approval/disapproval rights were eliminated by this statement in the proposal. The Comptroller General found that FYI had been prejudiced. GAO recommended termination of RGII's contract and award of the contract to FYI. [Ref. 28]

### **C. ANALYSIS AND CONCLUSION**

The purpose of this analysis is to provide contracting officers with insight as to possible agency miscues when evaluating labor qualifications.

#### **1. Certainty of Requirements is Critical to Successful Evaluation and Award**

*Barents* is a fascinating protest because the outcome hinged on the definition of a professional title. The RFP called for three Investment Banker resumes from each offeror. Two awardees provided two sets of legitimate resumes that satisfied the professional definition of an investment banker. However, each of the two awardees provided resumes for consultants for their last (third out of three) investment bankers. The protester deftly utilized a dictionary of banking to argue successfully that the



consultants were not actually investment bankers. GAO held that the agency did not evaluate the proposals in accordance with the RFP. The question at hand was whether or not the Investment Bankers had to have experience commensurate with their title. GAO held that experience was required. GAO cited the solicitation's promise that the agency would assess whether "the offer [provided] adequate evidence of appropriate academic credentials and depth of experience and professional qualifications." [Ref. 23] The Comptroller General determined that this promise placed the offerors on notice that they must include in their proposals three resumes of individuals *who had worked as* investment bankers. The third resumes of the two awardees clearly did not contain personnel with experience in investment banking. The implication for contracting officers lies in the need to explore fully the requirement for which a solicitation is being crafted. The arguments of the agency indicated that it did not need three experienced investment bankers to satisfy the customer needs. However, the solicitation called for three investment bankers. The agency overburdened the RFP with unnecessary requirements and failed to hold two awardees to these requirements; consequently, AID was unable to defend two of their contract awards to the satisfaction of GAO.

## **2. Follow the Solicitation**

As in previous chapters, a Federal agency's inability or unwillingness to follow the terms of solicitations results in sustainments. *FYI* is a situation in which the protester was the only offeror to meet the RFP requirement for submission of personnel data files

(PDF) for 50 percent of the personnel proposed for each labor category. The technical evaluation team (TET) recognized this and recommended that the senior selection official (SSO) award the contract to FYI. The SSO was swayed only by the awardee's lower cost and ignored the TET's recommendation. The SSO believed that the PDF problem could be dealt with as a contract administration issue, so the award was made to the lower priced proposal. GAO did not concur and held that the awardee's proposal did not meet the material terms of the solicitation. The holding stemmed from a previous protest (*National Medical Staffing, Inc.; PRS Consultants, Inc., 69 Comp Gen 500, 502 (1990)*) where the Comptroller General had held that "a proposal that fails to conform to the material terms and conditions of the solicitation should be considered unacceptable and may not form the basis for an award." [Ref. 28]

GAO also determined that the SSO's intent to handle the PDF problem during contract administration was undercut by a provision in the RFP that permitted agency approval/disapproval of personnel only during evaluation. By making the award to RGII, the agency accepted the individuals that were proposed in an unacceptable manner (lacking PDFs for 50 percent of each labor category). The agency, in effect, waived RGII's personnel qualifications requirement, which resulted in unfair and unequal evaluation. This particular holding by GAO arose from a "fundamental principle of federal procurement that offerors be treated equally; that is, offerors must be provided with a common basis for the preparation of proposals, and award based upon the

requirements stated in the solicitation, unless the offerors are notified of changes in (or relaxation of) the agency's stated requirements." [Ref. 28] The implication for contracting officers is that the RFP must be followed. All provisions must be observed to ensure fairness to the offerors. Any changes to the solicitation must be announced and made available to all offerors to preserve fairness.

Contracting officer should take these two valuable lessons with them to avoid sustainable protests when evaluating labor qualifications. First, contracting officers must ensure the solicitation is crafted to match the requirement. Second, adherence to the solicitation is critical to a fair award. Chapter VIII addresses improper agency pre- and post-award changes that resulted in protest sustainments in 1997.



## **VIII. IMPROPER AGENCY PRE- OR POST-AWARD CHANGE**

### **A. INTRODUCTION**

Improper Federal agency pre- or post-award change is cited as a sustaining argument in 14 percent of the successful protests in 1997. Improper changes result in the unfair evaluation of offerors' proposals pursuant to a best value award. A change of a significant nature is normally followed by an amendment to the solicitation (pre-award) or modification to the contract (post-award). The three protests that were sustained due to improper agency changes are *International Data Systems, Inc.*, *Marvin J. Perry & Associates*, and *Symetrics Industries Inc.* This chapter discusses the FAR requirements regarding pre- and post-award changes, describes the three sustained protests, and provides analysis and conclusions.

### **B. CHANGES AND THE FAR PART 15 REWRITE**

The fundamental regulations regarding changes in Government requirements and changes to solicitations are addressed in the FAR Part 15 rewrite; however, there were no substantive changes from the previous version. The basic precepts are:

1. If, either before or after receipt of proposals, the Government changes its requirements or terms and conditions, the contracting officer must amend the solicitation.
2. Amendments issued before the established time and date for receipt of proposals must be issued to all parties receiving the solicitation.

3. Amendments issued after the established time and date for receipt of proposals must be issued to all offerors that have not been eliminated from the competitive range.
4. If a proposal of interest to the Government involves a departure from the stated requirements, the contracting officer must amend the solicitation without revealing to the other offerors the alternate solution or any other information that is entitled to protection. [Ref. 1: 15.206, Ref. 13: 15.606]

Post-award contract modifications are also addressed in both versions of FAR Part 15 with no significant changes. The applicable regulation states that any changes to existing contracts are required to be in scope (minor and within the context of the original contract). [Ref. 13: 43.201]. Out-of-scope changes undermine the concept of fairness in the previous best value evaluation and contract award.

## **C. PROTESTS**

### **1. International Data Systems, Inc.**

*International Data Systems, Inc., B-277385, Comptroller General of the United States, 8 October 1997, (IDS)* was discussed in Chapter V because it is a protest that was sustained due to improper agency evaluation of technical merit/ability. *IDS* was also sustained because of an improper agency change to the solicitation. International Data Systems protested the Department of Interior (DOI) award of a fixed-price, indefinite delivery/indefinite quantity contract for personal computers with Pentium Pro processors.

The contract time period was to span six months. DOI found Applied Computer Technology (ACT) to be the offeror representing the best value to the Government.

The RFP stated that a Technical Evaluation Panel (TEP) would consider the following evaluation criteria: conformance with technical specifications—40 percent, past performance—40 percent, and price—20 percent. Forty-two offers were received with only seven in the competitive range. In addition to the Pentium Pro processors specified in the solicitation, ACT proposed a newer alternative: the Pentium II processor. ACT's proposal urged the agency to consider the Pentium II processor. The reason cited by ACT was that the RFP stated that replacement parts and support must be available for the lifetime of the system, and Intel (the processor manufacturer) had indicated that the Pentium Pro would be phased out by the close of 1997. Intel had also informed ACT that the Pentium II was the scheduled replacement for the Pentium Pro. The contracting officer considered the alternative Pentium II processor offered by ACT as "state of the art." [Ref. 21] The DOI found ACT's proposal to be the best value and awarded them the contract. In ACT's contract, the agency added a line item (for the Pentium II processor) that did not appear in the original solicitation. IDS protested.

IDS argued that DOI failed to amend the solicitation properly. The Comptroller General agreed. GAO stated that agency requirements changes after issuance of a solicitation dictate that the agency must amend the solicitation, notify offerors of the changes, and afford them an opportunity to respond. Furthermore, the requirement to

amend the RFP exists even after the submission of BAFOs, up to the time of award.

GAO determined that while the solicitation outlined a Pentium Pro processor, the agency determined during the course of the procurement that the Pentium II best represented the customer's needs and should have been incorporated into the contract. GAO found that DOI was required to amend the RFP and permit all offerors an opportunity to submit revised proposals. The Comptroller General held that the combination of the improper agency evaluation of technical merit/ability (Chapter V) and the failure to amend the solicitation prejudiced IDS. The protest was sustained. Since the computers were already delivered and accepted, GAO recommended reimbursement of proposal and protest costs to IDS. [Ref. 21]

## **2. Symetrics Industries, Inc.**

*Symetrics Industries, Inc.; B-274246.3, B-274246.4, B-274246.5; Comptroller General of the United States; 20 August 1997, (Symetrics)* is a protest where a significant quantity change resulted in sustainment. Symetrics Industries protested the U.S. Air Force (USAF) award of a fixed-price, indefinite delivery/indefinite quantity contract for Lots IV through VII of the AN/ALE-47 Countermeasures Dispenser System (CMDS). The CMDS was an electronic warfare system used by the Army, Navy, and Air Force to guard aircraft from hostile missile attacks. The contract was to span four years. USAF determined Tracor, Inc. (Tracor) to be the offeror whose proposal represented best value to the Government.



The RFP outlined the best value proposal to be the one offering the best combination of utility, technical quality, business aspects, risks, and price. The evaluation factors were identified as (descending order of importance): (1) technical, (2) schedule, (3) cost/price (most probable life cycle cost), and (4) management. Tracor had been the Government's sole source for CMDS for the previous eight years. Tracor demonstrated in its proposal that it was the only offeror who could best produce the high quantity of CMDS units (Lots IV through VII) as well as offer an accelerated delivery schedule. USAF awarded to Tracor. Symetrics Industries protested.

The protester argued that the evaluation of the proposals was unreasonable because it was based on an erroneous quantity estimate. The protester maintained that the requirement for sequencers in Lot IV (3,219 of the total of all lots combined (3,775)) was so unusually high that only Tracor was able to take the extraordinary steps to meet the agency's need. The protester did not dispute the original evaluation and contract award. However, the agency canceled Lot IV due to lack of funding one week before their request for BAFOs and failed to amend the solicitation. Symetrics asserted that many of the weakness assessed against its proposal were related to the high number of sequencers required in Lot IV. Because the original solicitation no longer reflected an accurate quantity estimate, Symetrics asserted that the best value tradeoff in the final evaluation lacked a reasonable basis.

The agency countered stating that (1) the funding change did not diminish the Air Force's need for the sequencers, (2) funding could have been provided before the end of the lot ordering period, and (3) the protester was not prejudiced because the decision not to amend the solicitation applied to all offerors equally. GAO stated that the lot cancellation represented a significant change to the Government's requirement. The evaluation record showed that only Tracor was able to avoid schedule risk and meet the agency's need regarding Lot IV. Lots V through VII were much more manageable because they totaled only 491, 315, and 503 respectively. The Comptroller General stated that the record did not indicate a schedule risk problem (for Lots V through VII) for the protester in light of the reduced requirements. Furthermore, the prospect of future funding (that followed the cancellation) did not impact the agency's duty to amend the solicitation. As a result, GAO held that Symetrics had been prejudiced and sustained the protest. The Comptroller General recommended reopening of the competition, issuance of an amended solicitation, and reevaluation. [Ref. 30]

### **3. Marvin J. Perry & Associates**

*Marvin J. Perry & Associates; B-277684, B277685; Comptroller General of the United States; 4 November 1997, (MJP)* is protest in which a post-award change undermined the best value determination and resulted in sustainment. Marvin J. Perry & Associates protested the Department of the Navy award of a contract for 563, ten-piece sets of red oak sleeping furniture for a bachelor enlisted quarters at the Naval Training

Center, Great Lakes, Illinois. Nine of the ten types of furniture were available from the Federal Supply Schedule (FSS). The FSS program is a General Services Administration (GSA) program that provides agencies with a simplified process for purchasing commonly used supplies and services at prices associated with volume buying. The tenth type of furniture (footboards for beds) was solicited in conjunction with the items that were listed on the FSS. The Navy determined that DCI's proposal represented the best value to the Government.

Before the procurement, the Navy contacted an architectural firm to design the interior to the enlisted quarters. The firm recommended MJP as the company holding the FSS contract offering the lowest priced red oak furniture that met the functional aesthetic and quality needs of the service. The Navy solicited quotes from other FSS vendors of similar products to ensure that MJP's products represented the best value to the Government. The Navy issued a Request for Quotations (RFQ) for both the nine types of furniture available from the FSS as well as the last remaining type (footboards) not listed on the schedule. DCI proposed the lowest quote for the nine items at \$ 557,127 while MJP submitted the next lowest price of \$ 572,709. However, MJP offered the lowest price of \$ 18,016 for the footboards, and DCI quoted the next lowest price of \$ 19,789. The Navy awarded the contracts to the offeror with the lowest total price—DCI. One month before the delivery date, DCI informed the Navy that their supplier had mistakenly delivered ash wood instead of the red oak. DCI proposed that the agency either accept

the furniture in ash or postpone the delivery date. After reviewing DCI samples of ash wood stained to match the appearance of red oak, the Navy decided that the ash furniture was an acceptable substitute. The Navy accepted delivery of the ash furniture approximately one month later. Upon learning of the wood substitution, MJP protested.

MJP argued that changing the wood from red oak to ash was unfair to other offerors. MJP maintained that they based their quotes on the prospect of providing furniture made from the superior grade of wood (red oak) and that they had not been given the opportunity to offer quotations using the lower quality wood (ash). MJP pointed out that authorization to use ash would have reduced their raw wood costs by 40 percent and their overall bid price by over \$ 47,000. The protester bolstered its assertion with copies of the *Weekly Hardwood Review* that showed that ash orders at the time sold for \$ 525 per board foot while red oak sold for \$ 855 per board foot. Finally, the protester stated that the lack of prior agency authorization to change the wood type should have caused the Navy to reject DCI's furniture and make the award to the next lowest quoter--MJP.

The agency first argued that the protest addressed a contract administration issue and was not under the purview of GAO. The Comptroller General stated the Navy's assertion was generally true; however, GAO asserted that out-of-scope modifications to existing contracts change the very nature of the original contract award. For this reason, the Comptroller General considered the protest. The Navy also stated that local

lumberyards had informed them that the scarce nature of ash resulted in only a one to five percent reduction in price from red oak. GAO was not swayed and stated that the Navy had not presented a basis for the Comptroller General to question the protester's documented contention that substantial savings was to be had through the wood substitution. GAO indicated that the best value determination was undermined and stated that the "original purpose of the orders was so substantially changed by the modification that the original orders and the modified orders are essentially different...By not issuing revised RFQs or checking other vendors' prices for ash furniture, the agency did not ensure that it received the best price for the ash furniture, which was the stated purpose for issuing the RFPs in the first place." Because the furniture had already been delivered, the Comptroller General recommended that the protester be reimbursed for its protest costs. [Ref. 29]

#### **D. ANALYSIS AND CONCLUSIONS**

The purpose of this analysis is to provide contracting officers with insight as to possible agency pitfalls when evaluating labor qualifications.

##### **1. Contract Awards Cannot be Made to Offerors Proposing Departures from Stated Requirements without First Amending Solicitations**

*IDS* is a protest in which the agency discovered, by virtue of a proposal, that they would have been better served with a more modern computer product. The awardee (ACT) urged the use of Pentium II processors rather than the Pentium Pro processors

solicited for in the RFP. The agency (DOI) issued the contract to ACT and deviated from the solicitation by adding a new line item to procure the newer Pentium II processors. GAO held that to the extent that DOI's needs changed to include the Pentium II processors, the agency was required to issue an amendment permitting all offerors a chance to submit revised proposals on a common basis. The holding was founded in both the FAR (15.606—pre-rewrite) and a previous protest (*Symetrics*—discussed in this chapter). Contracting officers must understand that when a proposal brings to light a different need for the Government, the need for an amended solicitation also emerges. [Ref. 21].

## **2. Significant Quantity Changes are Also Changes to Government**

### **Requirements and Require Amendments to Solicitations**

*Symetrics* shows contracting officers that quantity changes can sometimes drive a need for amendments to solicitations. The USAF wanted to procure several lots of electronic warfare sequencers. One week before the receipt of BAFOs, the program manager canceled Lot IV (3,219 sequencers) leaving only Lots V through VII (cumulative total of 1,309). The agency failed to amend the solicitation and awarded the contract to Tracor (previous sole source provider), largely because they had the ability to handle the high volume and fast delivery schedule required for Lot IV. The agency maintained that the requirement was still valid and that funding could have materialized. GAO found that the quantity change was material and sustained the protest. The holding was founded in

the FAR (15.606—pre-rewrite) stating that where an agency's requirements change after a solicitation has been issued, it must issue an amendment to notify offerors of the changes. GAO continued by stating that one circumstance where an amendment would be required is a significant change in the Government's estimate of the quantity it expects to order. Additionally, the Comptroller General considered the funding issue. GAO determined that when an agency experiences funding reductions, the agency is required to amend the solicitation to reflect the best estimate of the purchase amount. GAO cited a previous protest in support of these holdings (*Management Systems Designers, Inc., B-244383.8, Comptroller General of the United States, 8 June 1992*). Contracting officers must be cognizant of funding shortfalls as well as quantity changes and ensure amended solicitations are generated when significant changes occur. [Ref. 30]

### **3. Out-of-Scope Contract Modifications May Result in Sustained Protests**

*MJP* is a prime example of Federal agency failure to recognize an out of scope modification. The Navy sought to procure red oak furniture for a bachelor enlisted quarters. After awarding to the lowest bidder, the agency approved a change to in wood type because the awardee's supplier had mistakenly delivered ash. GAO determined that the original purpose of the order was substantially changed, so the original order and modified order were essentially different. There are several bases cited by GAO in this holding. First, the out-of-scope modification took a perceived contract administration

issue and converted it to a protest issue. GAO stated protests alleging out-of-scope modifications will be heard by the Comptroller General because such actions change the nature of the original contract award. GAO cited a previous protest in its explanation (*Indian Native American Employment and Training Coalition, 64 Comptroller General 460, 1985*). Additionally, GAO stated that although the agency conducted this procurement under the FSS program, it *chose* to solicit quotes from other FSS vendors. Having held a competition to ensure that they received the lowest priced item, the Navy was obligated to ensure that the competition was conducted in a fair manner. The Comptroller General stated that the FSS did not exempt an agency from treating vendors with the concern for fair and equitable treatment inherent to any procurements. GAO cited several previous protests to support this point (*Haworth, Inc; Knoll North American, Inc., 73 Comptroller General, 1994; SMS Systems Maintenance Services, Inc., B-270816, Comptroller General of the United States, 29 April 1996; and Dictaphone, Corp., B-254920.2, Comptroller General of the United States, 7 February 1994*). A key issue in this protest is fairness. There is an implicit contract between the Government and vendors that all offerors will be treated fairly and equitably in the procurement process. Post-award, out-of-scope modifications violate this concept and invite GAO to intervene if protests are submitted. This is precisely why GAO heard and sustained this protest. Contracting officers should take extreme care to ensure modifications are within scope.



Failure to do so can bring the validity of a best value evaluation and award into question.

[Ref. 29]

Contracting officers can take several lessons from this chapter. First, contract awards cannot be made to proposals offering departures from stated requirements without first amending solicitations. Second, significant quantity changes are also changes to Government requirements and require amendments to solicitations. Finally, out-of-scope contract modifications may result in sustained protests. Chapter IX provides conclusions to the thesis.



## **IX. FINAL ANALYSIS AND CONCLUSION**

### **A. INTRODUCTION**

The purpose of this chapter is to provide contracting officers with an overall picture of the pitfalls that exist during the solicitation and contract award process when using best value criteria. First, this chapter addresses these problems within the context of the contracting process. Second, the reader will be able to see common threads of improper agency performance that resulted in protest sustainments in 1997. Third, the tradeoff function is analyzed. Fourth, the research questions are formally answered. Fifth, the chapter conclusion is provided. Finally, areas for future study are outlined.

The contracting process consists of six steps as shown below:

1. Acquisition Planning
2. Solicitation
3. Source Evaluation
4. Negotiation
5. Contract Award
6. Contract Administration

The next six sections of this chapter discuss the sustained protests of 1997 within the context of the contracting process.

## **B. ACQUISITION PLANNING**

Acquisition planning begins upon receipt of a requirement from the customer.

"Acquisition planning" means the process by which the efforts of all personnel responsible for an acquisition are coordinated and integrated through a comprehensive plan for fulfilling the agency need in a timely manner and at a reasonable cost. It includes developing the overall strategy for managing the acquisition. [Ref. 31: 7.101] The method of contracting and type of contract must be determined. A source selection plan and statement of work are formulated. Draft requests for proposals are created and pre-solicitation conferences may be held. Finally, funding must be verified.

### **1. Uncertainty of Requirement**

*Barents* demonstrates that a protest sustainment can be rooted in poor acquisition planning. The protest was sustained because of improper agency (AID) evaluation of labor qualifications. The evaluation of labor qualifications were found to be improper because two of the awardees failed to provide three resumes for personnel that met the professional definition of an investment banker. GAO held that AID had not evaluated the proposals in accordance with the solicitation. However, the source of the problem is evident from the agency's counter argument in this matter. AID maintained that despite the RFP, three experienced investment bankers were not necessary to satisfy the needs of the customer. [Ref. 23] Nevertheless, the solicitation was clear in its call for the three investment bankers. Effective acquisition planning relies on an accurate relation of the

customer's requirement to the contracting officer so that the contracting process may be executed properly. In *Barents*, either the customer misstated its need or the agency misinterpreted the requirement. Regardless, the protest was sustained because the RFP mandated requirements that were not necessary for the customer's needs to be fulfilled, and as a result, the agency did not evaluate the proposal in accordance with the solicitation. This uncertainty of the customer's requirement was a pivotal breakdown in acquisition planning.

### **C. SOLICITATION**

Solicitations are used in negotiated acquisitions to communicate Government requirements to prospective contractors and to solicit proposals. RFPs for competitive acquisitions must describe the Government's requirement, anticipated terms and conditions that will apply to the contract, information required to be in the offeror's proposal, and factors and significant sub-factors that will be used to evaluate the proposal as well as their relative importance. [Ref. 1: 15.203] The ability to craft an effective solicitation is critical to the success of the contracting process because the contracting officer must select evaluation criteria to be followed during source evaluation/selection. Poorly formulated solicitations invariably manifest themselves in improper agency actions (evaluations and source selections) in the later stages of the contracting process.

*HG* is an example where contradictory requirements in the solicitation resulted in an improper agency evaluation of technical merit. The evaluation of technical merit was

deemed to be improper because the solicitation had contradictory requirements. The true requirement of the agency was adequately represented in a conceptual drawing of a proposed office for the Forest Service. The drawing contained a computer room within a telecommunications room. However, the drawing was contradicted by an overriding written passage dictating that the computer room must be located away from any telecommunications equipment. GAO held that the agency did not follow the solicitation; however, the root of the protest stemmed from poorly stated requirements in the solicitation. It is clear in *HG* that the Forrester Service wanted a building with a layout that closely resembled the conceptual drawing. Unfortunately, the drawing did not match the controlling written provision for distance between the computer room and the telecommunications equipment. The agency's inability to convey their needs in the solicitation adequately resulted in sustainment. A sloppily written solicitation is a crucial mistake threatening the successful completion of the contracting process.

#### **D. SOURCE EVALUATION/SELECTION**

The objective of source selection is to select the proposal that represents the best value to the Government. The award decision is based on an evaluation of factors and significant sub-factors that are tailored to the acquisition and must (1) represent the key areas of importance and emphasis to be considered in the source selection decision and (2) support meaningful comparison and discrimination between and among competing proposals. Proposal evaluation is an assessment of the proposal and the offeror's ability

to perform the prospective contract successfully. [Ref. 1: 15.302-15.305] Most of the sustaining arguments in 1997 were rooted in poor source evaluation and/or source selection. The following paragraphs discuss agency improprieties such as failure to follow the solicitation, failure to utilize all pertinent facts, improper cost/price evaluation, and improper changes to a solicitation.

**1. Failure to Follow the Solicitation Consistently**

There are five sustained protests where the Federal agency failed to follow the solicitation when evaluating proposals. *TSI* illustrates improper agency evaluation of technical merit resulting in the Air Force's failure to follow the RFP. The awardee had failed to provide a scheduling system as prescribed in the solicitation. The agency accepted its promise to provide such a schedule and changed the awardee's adjectival score from the lowest to the highest attainable. The schedule never materialized, yet this did not hinder the agency from awarding to OTE.

In a related protest *NavCom* demonstrated how an improper agency evaluation of past performance can result from failure to follow a solicitation. The RFP placed great emphasis on "same or similar" TACAN experience. A peripheral agency goal to expand the defense base in the TACAN area gave the contracting officer cause to deviate from the evaluation criteria. The agency judged every offeror's past performance as same or similar; however, none of the firms had TACAN experience except the protester.

*Arora* is an example of improper agency evaluation resulting from failure to follow a solicitation while conducting analyses of price realism. The analyses of price realism were supposed to be conducted within the context of the offerors' past performance evaluations. However, the agency (Navy) was so concerned with *Arora* Group's unusual method of handling wage escalation, they rejected the protester's proposal based solely on perceived price realism problems. The Navy failed to analyze price realism within the context of past performance and created a separate and determinative evaluation factor that was not part of the stated evaluation criteria. GAO held that the Navy essentially ignored the solicitation requirements, so they sustained the protest.

*Tri-State* is another example of improper agency evaluation of price resulting from failure to follow a solicitation. The awardee gained a price advantage by improperly splitting the CLINs and offering both first quantity and next quantity prices. The agency allowed this price split even though the solicitation had no provision permitting such an action. GAO held that this beneficial pricing strategy was not afforded to all offerors, so the contract award was made outside the parameters set forth in the solicitation.

Finally, *FYI* demonstrates that an improper agency evaluation of labor qualifications can stem from RFP deviation. The agency technical evaluation team (TET) recommended award to the protester. The senior selection official ignored the TET and awarded to the lowest cost proposal even though the awardee failed to meet the RFP



requirement for submission of personnel data files. As in each of the other four protests, GAO held that the agency had not followed or held the awardee to the requirements listed in the solicitation.

Deviation from the RFP is the most common misstep regarding source evaluation/selection, and it transcends the various sustainment categories. The five protests were sustained for improper evaluation of four separate tradeoff elements (agency evaluation of technical merit, past performance, price, and labor qualifications); however, the root of each sustainment was the same: failure to follow the solicitation. The cause may sometimes be blamed on problems that occurred earlier in the contracting process such as an unclear requirement (*Barents*) or a poorly crafted solicitation (*HG*). However, the research shows that there is more often a problem in source evaluation and/or selection. Contracting officers that choose not to adhere to solicitations are easy protest victims. Contracting officers that inadvertently stray from the RFP parameters fair no better under the review of the Comptroller General. Adherence to the RFP is crucial to successful source evaluation/selection and ultimately the successful execution of the contracting process.

## **2. Failure to Utilize all Relevant Facts**

Agency failure to utilize all facts pertinent to a source evaluation/selection was found in three sustainments for improper agency evaluation of past performance and one sustainment for improper agency evaluation of technical merit. The past performance

sustainments are *MECSA*, *STA Engines*, and *IBSI*. In *MECSA*, fairness and consistency were key to the sustainment. The protester was downgraded for late delivery in an otherwise satisfactory performance appraisal. Conversely, the awardee was not downgraded for safety violations in a previous performance appraisal because the agency had determined that the “overall assessment had been satisfactory”. [Ref. 11] This was clearly an inconsistent and unfair evaluation of past performance. PCC chose to ignore the past performance problems of the awardee, and awarded the contract to FMS.

*IBSI* also involved an agency that knowingly disregarded relevant information about a protester. In addition to improperly assigning a good past performance rating to the awardee (who had no past performance), an employee at the agency (VA) had forgotten to fill out a reference form and reduced the protester’s pool of positive references from two to one. The contracting officer had a special relationship with the protester. This same contracting officer had written and administered the contract--about which the information was misplaced. Still the agency failed to consider the information. GAO held that the information was clearly known to the contracting officer and should have been included.

*STA Engines* involved agency problems of a different nature. The agency (USCG) erroneously applied irrelevant past performance data about an affiliate and unreasonably penalized the protester. GAO determined that the actions of the protester’s affiliate had no bearing on its ability to perform the terms of the anticipated contract. The

affiliate's past performance was stated to be important only if the relationship between the offeror and affiliate was such that the actions of one party directly affected the ability of the other party to perform.

*Cygnus* is an example of improper agency evaluation of technical merit stemming from a failure to read the protester's BAFO thoroughly. The protester had originally forgotten to include a statement of potential contract problems and solutions in the proposal. The required information was included in the protester's BAFO, but the agency did not factor the information in the final evaluation. GAO held that the relevant information should have been evaluated. In all four cases, the Comptroller General determined that an improper agency evaluation had occurred because of the agencies' failure to assemble, interpret, and utilize relevant information properly about awardees and/or offerors.

In each of the three past performance improprieties, there is one driving theme: relevance of information. If past performance information is relevant to an offeror's ability to satisfy the terms of a contract, it must be factored into the source evaluation and selection. If it is irrelevant, it must be withheld from evaluation. Contracting officers must carefully screen and interpret all contractor information to determine if it is relevant to the contemplated contract. In *Cygnus* (improper evaluation of technical merit), there was no question of relevance--only a lack of attention to detail by the contracting agency when evaluating technical merit. The implication for the contracting officer is that proper

use of information is key to fair and impartial source evaluation and selection. It is fundamental to the successful completion of the contracting process in pursuit of a best value award.

### **3. Remember the Importance of Cost/Price**

Cost/Price is the central and most important tradeoff element. Contracting officers cannot forget that total cost/price must be evaluated in every negotiated procurement. Use of other cost/price related data (e.g. cost risk) may prove to be helpful in source evaluation and selection; however, the contracting officer is never relieved of the requirement to evaluate and compare total cost/price. *Boeing* and *Sylvest* are two examples where agency failure to evaluate total cost/price resulted in sustainment. In *Boeing*, the Federal agency (SOCOM) was unfamiliar with the requirement to evaluate and compare total cost even though their solicitation clearly and correctly dictated this action. *Sylvest* involved a less obvious miscue. The agency (TVA) was found to have evaluated and compared the total prices inadequately because they awarded the contract to a firm that had listed a necessary computer hard disk modification as optional. GAO held that by not including the price of the *option* in the price evaluation, TVA failed to compare the awardee's total price to the protester's total price. Evaluation and comparison of offerors' total cost/price is a fundamental precept in source evaluation and selection. A protest that establishes a Federal agency failure of this type is very sustainable.

Another important cost/price issue is effective evaluation of cost or price realism. *Barents*, *Geo*, and *Arora* all demonstrate that agency failure in this regard may result in sustainments. In *Barents*, the agency cost realism analysis was found to be inadequate because it failed to uncover an improper contingency placed upon the awardee's cost proposal. In *Geo*, cost and price realism analyses were required. The agency simply did not conduct price realism analyses on any of the proposals or BAFOs. Regarding cost realism, an agency misconception about the relationship between sample task costs and task order requirements contracts doomed the evaluation. The solicitation identified sample task cost analyses as measures of contractor understanding only. GAO determined that sample task costs were the only reasonable method for cost estimation in such a contract because the actual costs to the Government would certainly have varied according to the issuance of task orders.

*Arora* shows that an erroneous agency analysis of a protester's price realism results in sustainment. The protester was downgraded because the Navy had concerns about its failure to provide for wage escalation in its price proposal. The protester had explained that its long-term employment agreements and a budget for recruitment in their General and Administrative costs precluded the need for wage escalation provisions. GAO agreed and held that the agency's analysis of price reasonableness unreasonably discounted the labor agreements and erroneously undervalued the G&A budget (recruitment) by 90 percent. It is very important for contracting officers to maintain an

awareness of cost/price issues. Failure to evaluate and compare total cost and improper cost/price realism analyses properly was a sustainable argument in five of the 21 successful protests. As a result, the source evaluation/selection was compromised and the contracting process disrupted.

#### **4. Amend Solicitations to Reflect Changes in Government Requirements**

Improper changes result in an unfair best value evaluation and source selection. *IDSI* and *Symetrics* are good examples of agency failure to amend a solicitation to reflect changes in Government requirements. In *IDSI*, the awardee had proposed an alternative state-of-the-art computer processor (Pentium II) in addition to the one for which the solicitation was issued (Pentium Pro). The resultant contract for delivery of computers with the Pentium II processor was a deviation from the stated requirements in the solicitation. No amendment to the solicitation had been issued, and the result was a protest sustainment. *Symetrics* demonstrates that a significant quantity change is a change to the Government requirement and requires an amendment to the solicitation. One week before BAFOs, funding was canceled for the first lot in the contract. This lot represented 71 percent of the total contracted quantity. The agency felt an amendment to the solicitation was not necessary because of its continued need for the goods and a potential for increased funding. GAO stated that potential funding did not change the fact that the quantity was significantly changed, and an amendment was required. The implication for contracting officers is that significant changes to Government

requirements (that occur up to the point of award) must be reflected in amendments to solicitations. This is to ensure fairness for all offerors. The penalty for award without an amendment is an improper source evaluation and selection that cripples the contracting process.

#### **E. NEGOTIATIONS/DISCUSSIONS**

Negotiations are exchanges that occur after the establishment of the competitive range. They are undertaken with the intent of allowing offerors to revise their proposals. Discussions are negotiations tailored to each offeror's proposal and if conducted, must be held with each offeror in the competitive range. The purpose of discussions is to maximize the Government's ability to obtain the best value based on the requirement and the evaluation factors set forth in the solicitation. [Ref. 1: 15.306] Failure to hold meaningful discussions was prevalent in several protests in 1997.

The issue of discussions is key to five of the 21 of the protest sustainments. Although this issue transcends the various tradeoff elements, contracting officers soliciting for best value awards seemed to have difficulty with discussions pertaining to past performance and cost/price in 1997. Three of the protests in question were sustained in part because of an agency failure to hold meaningful discussions about past performance. Two protest sustainments involved discussions regarding cost/price information.

Discussions regarding poor past performance reports must be held to give offerors an opportunity to account for the situation. *ACI* illustrates that even though the FAR is clear in this regard, mistakes can still be made. The agency mentioned only one of two negative past performance reports in discussions. Therefore, the discussions were not meaningful, and the protest was sustained. *McHugh* shows that the requirement to hold discussions applies to internal agency references as well as third party reports. The agency maintained that intra-agency reports were not subject to interpretation, so discussions were not required. GAO held that the FAR makes no such distinction and sustained the protest. *STA Engines* warns of the danger of blanket use of an affiliate's past performance as an indication of an offeror's ability to meet the terms of a contract. The Federal agency improperly applied the poor past performance of the protester's affiliate. In addition, they failed to inform the protester of its intent to use the affiliate's poor standing as an indication of their ability to perform. Again, a sustainment occurred, in part, because the agency failed to hold meaningful discussions about a poor report.

Regarding cost/price evaluation, *Tri-state* demonstrates that contracting officers must understand the difference between clarifications and discussions. When discussions are held, they must be held with all offerors in the competitive range. The awardee had proposed a different (unauthorized) pricing scheme by splitting the CLINs. In addition, the contracting officer wanted to *clarify* whether the *next quantity ordered* price would apply to future quantities. The Comptroller General held that the agency's perceived



clarifications (about the price of follow on quantities) were actually discussions. The fact that these discussions were not held with all offerors contributed to the sustainment of this protest. In *Tri-State*, GAO appeared to draw a firm distinction between clarifications and discussions. This effort, in the pre-rewrite months of 1997, may have been designed to clearly define these concepts before the rewrite introduced the newest form of exchange--communications. *Boeing* is a protest where the agency first failed to accurately conduct cost evaluation (labor hours and overhead) and then failed to inform the protester during discussions. GAO held in this protest that the errors in cost evaluation were not, by themselves, sustainable miscues. However, the evaluation errors coupled with the failure of the agency to raise the perceived problems during discussions resulted in sustainment.

Discussions are not always the major flaw in a protest. Sometimes the lack of discussions simply accompanies an agency impropriety in evaluation of one of the tradeoff elements. The key behind meaningful discussions is that if properly held, protests may be prevented. In *STA Engines* it is quite possible that if the protester had been informed of the agency's application of its affiliate's past performance, objections by the protester could have caused agency to research the issue further and make proper source evaluation decisions. *Tri-State* is another example where discussions may have uncovered the awardee's unfair pricing scheme and caused the agency to extend the benefits of the scheme to all offerors. In *Boeing*, discussions may have resulted in

correction of the agency's errors during cost evaluation. Such actions would have made these contract awards valid. The implication for contracting officers is that the FAR Part 15 rewrite encourages even more exchanges between agencies and offerors than were permitted under the former regulation. Contracting officers must make use of the increased opportunity for communications, clarifications, and discussions to eliminate situations such as *ACI*, *McHugh*, and *STA Engines* where discussions simply were not held. However, *Tri-State* demonstrates that contracting officers must be fully aware of the types of exchanges they are utilizing to prevent misapplication of clarifications, discussions, or communications. Highly trained contracting officers will be able to effectively use the expanded exchanges to ensure fair and impartial source evaluation/selection and proper best value award.

#### **F. CONTRACT AWARD**

Contract award is made to the offeror whose proposal represents the best value to the Government. One situation that undermines a best value award is a lack of supporting narrative for the award. This problem seems to be rooted in evaluations of technical merit. Three GAO protest decisions indicated that a lack of narrative contributed to sustainment, and all three of these protests were sustained due to improper agency evaluation of technical merit.

In *MECSA*, the agency (PCC) provided no justification in the evaluation record for overriding the protester's lower price when making award. Also, the lack of narrative

provided no proof that PCC had accounted for a special certification held by one of the protester's subcontractors. *Jones* demonstrates that numerical score sheets are not enough to document the best value tradeoff. The protester successfully argued that the agency could not justify its award because the evaluation record consisted only of score sheets with terse bullet narrative. In *JW*, the dearth of narrative provided no explanation as to why the Federal agency scored the awardee higher under an evaluation factor when the protester appeared to be significantly superior. The only supporting documentation consisted of a one paragraph per offeror narrative that failed to explain any of the scoring or reasons for award.

The Government's previous preoccupation for low cost/price gave rise to a situation where thorough narrative was not necessarily critical in support of cost/price analyses, matrices, and score sheets. In best value contracting a tradeoff occurs, and price is now only one of several significant concerns. It is important to note that narrative is critical because the benefit of a tradeoff is not self evident from a numerical or adjectival score. The implication for contracting officers is that best value contracting drives a higher standard for supporting narrative. Neither GAO nor the FAR Part 15 rewrite address the quantity or quality of narrative required to adequately support a best value award. In *MECSA*, *Jones*, and *JW*, supporting narrative was either absent or barely existent. The best value tradeoff is difficult to express numerically. GAO appears to be calling for contracting officers to document and justify their award thoroughly.

Supporting comments give the contracting officer a chance to outline the rationale for their source selection fully. Strong award decisions are built on a foundation of strong evaluation and supporting narrative. Agency awards without such narrative are weak and prone to sustainment.

#### **G. CONTRACT ADMINISTRATION**

Contract administration is performed by either the PCO, or through delegation, by an ACO at a Contract Administration Office (CAO). The overarching theme to contract administration is oversight, and protests are often thought to be a past danger. However, it is key to understand that protests can still occur through action or inaction during contract administration. *FYI* illustrates that a contracting officer's plan to address a problem through contract administration may result in an improper contract award and a sustained protest. The senior selection official (SSO) believed that the awardee's failure to provide personnel data files (PDF) for 50 percent of the personnel proposed for each labor category could be handled through a substitution clause in contract administration. As a result, the SSO's award was successfully challenged because GAO held that the awardee had not met the requirements of the solicitation.

Clauses allowing the Government to make adjustments in the post-award phase do not relieve the contracting officer from making a fair and impartial best value award. *MJP* demonstrates that out-of- scope changes shift the very foundation of a best value award and can be the subject of a protest. The agency allowed the awardee to deliver

furniture made of ash instead of the much more expensive red oak called for in the solicitation. GAO held that the original purpose of the order was substantially changed, and the original order and modified order were essentially different. The best value award was invalidated. The implication for contracting officers is that out of scope changes can convert contract administrative issues into protest issues. GAO will hear protests alleging out-of-scope changes and modifications. In this situation, the ten day protest window is essentially waived by GAO. The *clock* begins with a protesters first knowledge about an alleged miscue. A post-award agency impropriety and subsequent protest could occur months or years after award. Provided that the protester files the protest in a timely manner (after gaining knowledge of an alleged offense), GAO will hear the protest. In sum, Federal agencies must understand that protests can be promulgated by a contracting officer's actions during contract administration. Such actions can destroy all of the hard work that goes into a solid and proper best value award.

## **H.     TRADEOFFS**

This researcher finds no evidence that the act of making tradeoffs was problematic for contracting officers in 1997. Because tradeoffs are the very heart of a best value award, one may have assumed that problems with best value awards could be traced to improper tradeoffs by a Federal agency. The evidence suggests otherwise. Improper agency tradeoff was alleged in 40 of the 108 best value protests in 1997. Interestingly,

allegations of improper agency tradeoff were never sustained. The implication is that the Comptroller General supports the contracting officers' judgment regarding best value tradeoffs provided that they (1) evaluate the various tradeoff elements (cost/price, technical merit, past performance, labor qualifications) properly, (2) award the contract without making improper pre-award changes to the solicitation, and (3) do not make out-of-scope post-award changes.

## **I. RESEARCH QUESTIONS**

### **1. Primary Research Question**

*To what extent does the exercise of Federal agency contracting officer judgment, in best value source selection, result in a higher rate of GAO protest sustainment than other methods of source selection?*

As stated in Chapter III, the research evidence shows that 21 of the 108 best value protests were sustained rendering a sustainment rate of 19.44 percent. GAO's sustainment rate for all protests in 1997 was 12 percent.

### **2. Subsidiary Research Questions**

*What is Best Value, the genesis of the concept, the evolution of this type of contracting, current implementation, and the regulations that apply?*

As stated in Chapter II, there is no definitive starting point for the concept; however, businesses have historically sought to purchase goods and services at a value to facilitate their pursuit of profit. The Government focus on best value began with the

1986 Packard Commission recommending the use of commercial practices. DoD officially recognized the best value concept in a study entitled *Best Value Evaluation Process*. In the 1990's, acquisition reform measures such as FASA and the efforts of the Clinton Administration placed best value squarely at the center of Government contracting. These efforts culminated in the rewrite of the FAR Part 15 in which best value was defined and recognized as the goal of every Government procurement.

In sum, best value is the expected outcome of any acquisition that ensures the customer's needs are met in the most effective, economical, and timely manner. It is the result of the combination of: the unique circumstances of each acquisition; the acquisition strategy; choice of contracting method; and the award decision. Best value is the goal of sealed bidding, simplified acquisition, commercial item acquisition, negotiated acquisition, and any other specialized acquisition method or combination of methods. Through the best value continuum the Government always seeks to obtain the best value in negotiated acquisitions using any one or a combination of source selection approaches, and that acquisition should be tailored to the requirement. At one end of this continuum is the lowest priced-technically acceptable strategy and at the other end is a process by which elements of a proposed solution can be traded off against each other to determine the solution that provides the Government with the overall best value. All such tradeoffs must be conducted according to the source selection factors and sub-factors identified in the solicitation. [Ref. 3: p. 1]

*Can the reasons for the sustainments be categorized? If so, what are the categories?*

As stated in Chapter III, the researcher has categorized the reasons sustainment by tradeoff element. The categories are identified by protester allegations of Government impropriety in their agencies' evaluation of the following tradeoff elements: cost/price, past performance, technical merit, and labor qualifications. One separate category has been created to accommodate improper agency pre- and post-award changes that invalidated best value awards.

*Are there measures that a contracting officer can take to preclude protests regarding Best Value awards?*

Chapters IV through IX have identified lessons contracting officers can learn from the 1997 sustainments to avoid improprieties that could result in sustained protests.

These lessons include:

- The need for contracting officer certainty of the requirement during acquisition planning.
- The importance of a well-crafted solicitation.
- The critical requirement to follow the solicitation during source evaluation and selection.
- The need to use all relevant facts during source evaluation and selection.
- The importance of cost/price evaluations and cost/price realism analyses during source evaluation and selection.



- The dangers of failing to amend a solicitation when changes in Government requirements occur during source evaluation and selection.
- The need for supporting narrative to support the best value award.
- The fact that post-award out-of-scope changes can result in sustainable protests.
- The understanding that a contracting officer's intent to fix a problem with a potential awardee's proposal during contract administration must not unfairly prejudice the other offerors.

*How may contracting officers be better trained regarding best value awards?*

Contracting officer training should focus on the traditional importance of cost/price as a tradeoff element; however, increased emphasis should be applied to evaluation strategies and techniques for the other tradeoff elements (past performance, technical merit, and labor qualifications). Furthermore, contracting officer training must enhance awareness that pre- and post-award changes could invalidate an otherwise proper best value source selection and result in a protest and sustainment.

## **J. CONCLUSION**

It is in the basics that contracting officers failed in 1997. Evaluations of the elements of tradeoff were often improper because of unsure requirements, lack of discussions, failure to use relevant facts, failure to consider total price/cost, etc. It is important to note that the FAR Part 15 rewrite in the spirit of acquisition reform is

designed to create a smoother path to contract award through innovative practices such as best value as well as improving quality and preserving fairness. However, best value in some ways creates a higher standard for the contracting officer. Before, the focus was simply cost/price or related factors. Now the contracting officer must deftly evaluate as many as four tradeoff elements including cost/price. It is possible that the requirement for thorough evaluation of multiple tradeoff elements could actually increase the level of the contracting officer's workload since the days of the dominant focus on cost/price. In sum, best value does not grant the contracting officer a license to make arbitrary contract awards. GAO seems to be consistent in their approach to best value contracting. Contracting officer judgment is still well supported by GAO, but the Comptroller General's continuing focus on fairness and impartiality is the cornerstone for the 21 sustainments. Contracting officers must be mindful of this fact as they increase their use of best value source selection.

#### **K. AREAS FOR FURTHER RESEARCH**

The following areas for future research regarding best value are:

1. Conduct follow-on analyses of best value protests for years beyond 1997.
2. Develop a model to assist contracting officers when engaged in best value contracting.

3. Conduct an in-depth analysis of a specific tradeoff element (cost/price, technical merit, past performance, or labor qualifications) as it relates to best value contracting.
4. Conduct an in-depth analysis of out-of-scope changes to contracts as they relate to best value contracting.
5. Conduct a joint analysis of best value contracting with GAO.



## APPENDIX

### PROTESTS OF 1997 INVOLVING BEST VALUE CRITERIA

**Symbols:** S-Successful Best Value Protest; U-Unsuccessful Best Value Protest;

NC-Did Not Meet Criteria as Best Value

<b><u>Symbol</u></b>	<b><u>Protest Name</u></b>	<b><u>Decision</u></b>	<b><u>Date</u></b>
U	AAC Associates, Inc.,	B-274928	13-Jan-97
NC	Aalco Forwarding, Inc.	B-277241.12/.13	29-Dec-97
NC	ACS Systems & Engineering, Inc.,	B-275439.3	31-Mar-97
NC	Advanced Designs Corporation	B-275928.2/.3	21-Apr-97
U	Alcan Environmental, Inc.,	B-275859.2	11-Apr-97
NC	All State Boiler Work, Inc.,	B-277362	3-Oct-97
U	Alliant Techsystems, Inc.,	B-276162/.2/.3	2-May-97
NC	Allied Signal, Inc., Electronic Systems,	B-275032/.2	17-Jan-97
S	American Combustion Industries, Inc.,	B-275057.2	5-Mar-97
NC	American Marketing Associates, Inc.,	B-274454.4	14-May-97
U	American Native Medical Trans. L.L.C.,	B-276873	5-Aug-97
U	Ameriko, Inc.,	B-277068	29-Aug-97
NC	Analytical & Research Technology, Inc.,	B-276064	7-May-97
U	Ares Corporation,	B-275321/.2	7-Feb-97
S	Arora Group, Inc.,	B-277674	10-Nov-97

NC	Assets Recovery Systems, Inc.,	B-275332	10-Feb-97
NC	Atlantic Scientific & Technology Corp.	B-276334.2	27-Oct-97
U	ATLIS Federal Services, Inc.,	B-275065.2/.3	12-Feb-97
U	AVIATE L.L.C.,	B-275058.6/.7	14-Apr-97
S	Barents Group, L.L.C.,	B-276082/.2	9-May-97
U	BE, Inc.; PAI Corporation	B-277978/.2	16-Dec-97
NC	Best Foam Fabricators, Inc.,	B-275436	20-Feb-97
S	Boeing Sikorsky Aircraft Support,	B-277263.2/.3	29-Sep-97
U	Booz-Allen & Hamilton, Inc.,	B-275934.2	29-May-97
U	Brisk Waterproofing Company, Inc.,	B-276247	27-May-97
U	Bristol-Myers Squibb Company,	B-275277	5-Feb-97
U	California Environmental Engineering,	B-274807/.2	3-Jan-97
U	Canadian Commercial Corporation	B-276945	31-Jul-97
NC	Charles E. Smith Companies	B-277391	25-Sep-97
U	Chek F. Tan & Company,	B-277163	8-Sep-97
NC	CHI Fabrication Services,	B-275079	22-Jan-97
U	Cincom Systems, Inc.,	B-275055/.2	21-Jan-97
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